

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE:

AIR CARGO SHIPPING
SERVICES ANTI TRUST
LITIGATION,

06-MD-01775 (JG)

United States Courthouse
Brooklyn, New York

Tuesday, April 29, 2008
10:00 a.m.

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TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT ON MOTION TO
DISMISS
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

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1 (In open court.)

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Good morning. Please, be seated.

4 ALL: Good morning.

5 THE COURT: I'm going to take just a moment to get
6 acquainted on the bells and whistles here because I'm not
7 familiar with them either. I gather some of you have become
8 familiar.

9 (Discussion held off the record.)

10 (Pause in the proceedings.)

11 THE COURT: All right. Good morning.

12 You want to call the case, Jim?

13 COURTROOM DEPUTY: Yes, Civil Cause for Oral
14 Argument in 06-MD-1775, In Re: Air Cargo Shipping Services
15 Antitrust Litigation, Magistrate Judge Pohorelsky presiding.

16 THE COURT: Good morning, again.

17 As you already know, we'll be proceeding in a pretty
18 formal fashion because of the various devices that people want
19 to use, and the only way really to do that effectively, I
20 think, is from the podium.

21 So, the way I envision proceeding, and who knows
22 what will happen as this goes on, is that the movants will
23 have the first chance to speak, the movants' representative,
24 and then the opposition, and then some rebuttal. There may be
25 surrebuttal, we may go back and forth a few times, as I think

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1 of more questions to ask.

2 But I would like to start by having whoever speaks
3 first with respect to a given issue, start with their
4 presentation, let me know what they've prepared in terms of
5 visual aids that they want me to be aware of and that they may
6 use in their arguments, so that I'll be aware.

7 I'd like you to be able to present the argument in
8 the way that you envisioned, as much as possible
9 understanding, of course, that I'm going to be interrupting
10 you with questions as we go along.

11 So, are there any questions or suggestions about how
12 we should proceed? Other than what I've articulated so far?

13 (No response.)

14 THE COURT: All right. Thank you for preparing, or
15 letting me know who's going to be carrying the ball on these
16 issues. So, I might as well start with the first one.

17 I guess it's Mr. Schwartz, carrying the ball for the
18 defendants?

19 MR. SCHWARTZ: Yes, Your Honor.

20 THE COURT: Okay.

21 (Pause in the proceedings.)

22 MR. SCHWARTZ: Your Honor, I do have a visual
23 presentation. Our cover slide is up on the screen now.

24 (The above-referred to slide was published to the
25 courtroom.)

1 MR. SCHWARTZ: And if it might be helpful, we also
2 have hardcopies of the slides themselves that we're prepared
3 to hand up, if you'd like.

4 THE COURT: I guess it wouldn't hurt for me to have
5 them. I'm not sure how much use I'll make of them, but if you
6 want to.

7 MR. SCHWARTZ: Sure. And we also have copies for
8 plaintiffs' counsel, if they'd like some.

9 THE COURT: Yes, please. To the extent they are
10 interested, they should receive copies, as well. Thank you.

11 ARGUMENT I

12 BY MR. SCHWARTZ:

13 MR. SCHWARTZ: Thank you, Your Honor. Edward
14 Schwartz, DLA Piper, Counsel for Cathay Pacific Airways
15 Limited, and I will be addressing the FTIA motion.

16 Your Honor, as I believe you are aware, the
17 plaintiffs are alleging that they were harmed by allegedly
18 paying overcharges as a result of a global conspiracy to fix
19 the prices for air cargo services. And plaintiffs, of course,
20 bear the burden of properly alleging subject matter
21 jurisdiction as to each of those claims. But that they have
22 clearly failed to do so with respect to those claims
23 predicated upon purchases of air cargo services for shipments
24 originating in a foreign country, regardless of the
25 destination to which the goods were ultimately shipped.

1 THE COURT: Okay. Here's the first question I do
2 have because I want to get a -- you used the phrase "foreign
3 purchases," I think, in your brief. And I think you concede
4 that domestic purchases of air cargo services, there is
5 subject matter jurisdiction for those.

6 MR. SCHWARTZ: That is correct, Your Honor.

7 THE COURT: So, how do you specifically define
8 foreign purchases, and distinguish those from domestic
9 purchases?

10 And just to sharpen this a little bit, what about an
11 American or domestic United States purchaser of services who
12 actually purchases the services here for transport of goods
13 from abroad to the United States as opposed to that purchaser
14 going, again, a domestic purchaser going to a foreign market,
15 if you want to call it that, and purchasing the same services?

16 And is there any legitimate way to draw a line
17 between those two?

18 MR. SCHWARTZ: Well, there is, Your Honor.

19 First, the plaintiffs have divided their claims by
20 location of purchaser. Counts 1 and 2 are brought on behalf
21 of purchasers located within the United States. Counts 3
22 through 7 are brought by foreign purchasers.

23 THE COURT: No, I understand that distinction.

24 But the location of the purchaser is one thing. The
25 location of the purchase is another.

1 MR. SCHWARTZ: And that exactly correct, Your Honor.

2 THE COURT: Okay.

3 MR. SCHWARTZ: And that is a fundamental element of
4 our analysis and argument.

5 A domestic purchaser would, of course, be in Count 1
6 if it's a direct purchaser, Count 2, if it's an indirect
7 purchaser.

8 If a purchaser physically located in the U.S.
9 reaches into foreign commerce, and reaches agreement with a
10 carrier for a shipment originating from a foreign country, for
11 purposes of the FTAIA, and in particular for purposes of the
12 threshold import commerce exception, within that threshold
13 language of the FTAIA, that would be treated as a foreign, not
14 a domestic purchase.

15 THE COURT: Because I mean, again, are you talking
16 about a domestic purchaser who calls Berlin and, you know,
17 asks some freight forwarder in Berlin or somebody, a
18 manufacturer in Berlin, to ship goods to him, to the
19 United States, or let's say take -- that's not exactly right.

20 Contracts directly with the carrier --

21 MR. SCHWARTZ: Right.

22 THE COURT: -- in Berlin. That's the one I'm really
23 thinking of. Calls Lufthansa in Berlin and says, I want to
24 ship BMW parts to the United States.

25 Is that one of the purchases that is barred by the

1 FTAIA, or that there's no subject matter jurisdiction?

2 MR. SCHWARTZ: Yes. Let me say preliminarily, that
3 to the extent, if any, that such transactions exist, they are
4 atypical. And the plaintiffs and defendants are in agreement
5 on this.

6 The plaintiffs concede, at pages 14 and 15 of their
7 opposition, that the way those transactions are typically done
8 is that it would be a freight forwarder.

9 Let's say hypothetically, we're talking about a
10 shipment of wine from Spain, somewhere in the world.
11 Typically, indeed the vast majority, at a minimum, of those
12 transactions will be entered into between a freight forwarder
13 and the carrier in Spain. Why? Because it is the local
14 freight forwarders that have the relationships with the
15 carriers.

16 Now --

17 THE COURT: Okay. But then, what about if the same
18 United States purchaser contacts Lufthansa here and says, can
19 you get these goods shipped here? Again, maybe that's the
20 atypical case.

21 I mean, your argument is that that's a -- is that a
22 pretty small universe of transactions?

23 MR. SCHWARTZ: It may not ever happen, but let's
24 assume for the purposes of your question it does happen.

25 THE COURT: Yes.

1 MR. SCHWARTZ: That specific hypothetical was
2 addressed directly by the Second Circuit in its decision in
3 Kruman. Charlotte Kruman, named plaintiff, a resident of
4 New Jersey, traveled up to New York to visit with Christie's
5 in New York.

6 In fact, can we please go to the slide reflecting
7 the Kruman transaction.

8 (The above-referred to slide was published to the
9 courtroom.)

10 MR. SCHWARTZ: Your Honor, we're showing you now a
11 slide -- and this is slide number three -- that graphically
12 demonstrates the Charlotte Kruman transaction.

13 Resident of New Jersey, Charlotte Kruman, travels to
14 New York, visits with Christie's in New York, sees a
15 photograph of a watch that she thought she might want to buy.
16 This watch happened to be one being sold at auction in London.

17 Next slide, please.

18 (The above-referred to slide was published to the
19 courtroom.)

20 MR. SCHWARTZ: She made a bid. And Christie's
21 New York transferred the bid to Christie's London. So, she
22 dealt with Christie's New York.

23 Next slide, please.

24 (The above-referred to slide was published to the
25 courtroom.)

1 MR. SCHWARTZ: She won the auction conducted in
2 London. Won the watch.

3 Next slide.

4 (The above-referred to slide was published to the
5 courtroom.)

6 MR. SCHWARTZ: Christie's imposed a buyer's premium
7 pursuant to the alleged global conspiracy, fixing prices
8 globally on auction services for buyer's premiums and seller's
9 commissions; conspiracies between Christie's, a U.K. company,
10 Sotheby's, a Michigan company. She dealt with Christie's.

11 Next slide, please.

12 (The above-referred to slide was published to the
13 courtroom.)

14 MR. SCHWARTZ: She paid the allegedly inflated
15 buyer's premium to Christie's.

16 The Court held this was not a domestic transaction,
17 did not involve import commerce.

18 The reason is simply, that it is a simple analysis
19 under the threshold import commerce exception. You look at
20 the conduct. You look at the conduct.

21 Here, the relevant conduct was the imposition of the
22 alleged overcharge on the buyer's premium at the auction in
23 London. The fact that Ms. Kruman dealt with Christie's
24 New York, even that she provided the bid to Christie's
25 New York, was irrelevant. The case doesn't even address

1 whether Christie's New York sent her the bill or whether it
2 was Christie's London that issued it. It didn't matter. Even
3 though, even though the plaintiffs claimed in that case a
4 global conspiracy to fix prices everywhere in the
5 United States.

6 Because the fundamental analysis under the
7 Sherman Act divides the world in two: There is U.S. conduct
8 and U.S. effects, and there's foreign conduct and foreign
9 effects. And for purposes of the narrow threshold import
10 commerce exception, the Court looks only at the conduct and
11 sees where is the overcharge imposed. And the fact that
12 Ms. Kruman was in New York was irrelevant. The fact that she
13 dealt with Christie's New York was irrelevant.

14 And that's exactly the situation that we would have
15 here if we're dealing with a, say, a U.S. freight forwarder
16 who contacts Lufthansa overseas, or even contacts them here.

17 If the arrangement being made was for a shipment of
18 goods originating in Germany, the relevant conduct would be
19 the imposition of the alleged overcharge at the point of
20 origin because prices attach at the point of origin, not at
21 the point of destination.

22 THE COURT: Is that, that's an industry standard, so
23 to speak?

24 MR. SCHWARTZ: It's the way the industry works.
25 Pricing -- let's talk about surcharges for a moment, which are

1 obviously, an important part of the plaintiffs' case.

2 Surcharges are applied X; X, the point of
3 origination. That is where the surcharges are set. But the
4 Court, as the Court in Kruman, doesn't even need to get into
5 that kind of factual inquiry, because again, the threshold of
6 import commerce exception is actually a simple analysis. Is
7 it a foreign price or is it a domestic price?

8 And it's deemed to be a foreign price if it's a
9 transaction originating in foreign commerce.

10 And originating doesn't mean where did the first act
11 occur. Originating means where was the price applied by the
12 defendant? Because it is the defendant's conduct and only the
13 defendant's conduct that is relevant in applying that narrow
14 threshold import commerce exception.

15 THE COURT: So, the long and short of it is that a
16 foreign purchase, for your purposes, the purposes of your
17 argument, is any purchase, transportation, services for goods
18 that are shipped from a point outside the United States to the
19 United States.

20 MR. SCHWARTZ: Yes. And those are the precise
21 transactions as to which we're moving under 1 and 2, domestic.
22 And truly, the foreign purchasers, 3 through 5. And for the
23 for Counts 3 through 5, foreign purchasers making purchases
24 for shipments originating in a foreign country with foreign
25 pricing, those are a no-brainer under our motion. That could

1 not be more clear. There is no argument, no reasonable
2 argument that those shipments involve somehow domestic
3 conduct, let alone an import market for purposes of the narrow
4 threshold import commerce exception.

5 THE COURT: You mean, I'm sorry. You're talking
6 about purchases of services for transportation of goods
7 between foreign points?

8 MR. SCHWARTZ: Yes. Entirely outside the
9 United States.

10 THE COURT: Where they're not to or from the
11 United States, is that the distinction you're making? I'm
12 sorry.

13 MR. SCHWARTZ: Well, the distinction, what I'm
14 addressing now are those claims brought under Counts 3
15 through 5 by foreign purchasers.

16 THE COURT: Right, foreign purchasers.

17 MR. SCHWARTZ: What we're saying is for those
18 purchases by foreign purchasers, for shipments originating in
19 a foreign country, it does not matter where the shipment goes.

20 THE COURT: Okay.

21 MR. SCHWARTZ: Because it's a foreign price that was
22 charged.

23 THE COURT: Right.

24 MR. SCHWARTZ: If we could go -- go to slide number
25 two, please, the overview of the FTAIA.

1 (The above-referred to slide was published to the
2 courtroom.)

3 MR. SCHWARTZ: It might be helpful, just very
4 briefly, to do a quick overview of the mechanics of the FTAIA.

5 The first question in any FTAIA inquiry is: Does
6 the defendant's conduct involve foreign trade or foreign
7 commerce? No dispute with the plaintiffs there.

8 The second question is: If it does, is it not
9 import or import commerce? If it is import commerce out of
10 the FTAIA, doesn't apply, still applies standing analysis, and
11 that is a separate argument that I will be addressing.

12 If it does not, if the defendant's conduct does not
13 involve import trade or import commerce, then you go to what
14 is really the heart of the FTAIA. That's the effects test.

15 THE COURT: But I don't see much argument from the
16 plaintiffs on the effects test.

17 MR. SCHWARTZ: I don't think we get much, frankly.

18 THE COURT: All right. They focus their argument,
19 at least in their opposition papers unless I overlooked
20 something, on the import trade or commerce.

21 MR. SCHWARTZ: They take a shot at 6(a)(2), which is
22 the only element under the effects test under which we're
23 moving. We're not moving under 6(a)(1). Only under 6(a)(2),
24 and that is the plaintiffs' burden to properly allege their
25 claims arise directly from independent harm to U.S. commerce.

1 We don't think there is, frankly, a serious argument under
2 6(a)(2). If the plaintiffs -- the plaintiffs are putting
3 their acts in the import commerce basket.

4 They want to get out of the FTAIA. Why? Because
5 they can't satisfy the effects test. Because they can't.

6 And we believe -- and we think this is absolutely
7 the correct analysis -- that it cannot be the case that claims
8 that cannot ultimately satisfy the effects test and, in fact,
9 fail by a wide margin, can't be taken out of FTAIA analysis.
10 Congress clearly did not intend that claims that don't satisfy
11 the effects test, which is a codification of the ALCOA test
12 that predated the enactment of the FTAIA in 1982, cannot give
13 rise to Sherman Act jurisdiction.

14 Can we go to the next slide, please.

15 (The above-referred to slide was published to the
16 courtroom.)

17 MR. SCHWARTZ: This is an excerpt of the relevant
18 language for purposes of our motion of the FTAIA. So, this is
19 the threshold language that contains the import commerce
20 threshold test.

21 The purpose of this part of the FTAIA is simple and
22 narrow. It does nothing more than defines the scope of the
23 conduct that will be subject to the effects test in the
24 statute. And the import commerce exception is simply, all it
25 says is: If it is import commerce, it is -- if it's not

1 import commerce, we go to the effects test.

2 And there are three critical points about this test.
3 And the words drive the analysis, as the Third Circuit
4 properly said in Turicentro.

5 First, import trade or import commerce, for purposes
6 of our motion, we don't have a dispute with plaintiffs over
7 what that means; if bringing in of goods or maybe, maybe a
8 service into the United States, we're not arguing that it
9 doesn't apply to services. Unclear, though.

10 Second, conduct. This is critical. It is only
11 defendant's conduct that is analyzed in applying the import
12 commerce exception. It's not the effects of the conduct.
13 That's in the effects test. And as the Third Circuit
14 correctly said in Turicentro, if conduct involving import
15 commerce is interpreted broadly, it eviscerates the meaning of
16 the reference to import trade or import commerce in the
17 effects test in of 6(a)(1).

18 In other words, conduct involving import trade or
19 commerce cannot be the same as conduct affecting import trade
20 or commerce, or this has no meaning. There would be no
21 conduct involving import trade or commerce left to analyze
22 here. So, conduct involving import trade or import commerce
23 must be given a narrow construction.

24 So, and again, it's because the import commerce
25 exception is intended just to be a quick look. A presumption.

1 If the conduct involves import trade or commerce, it's so
2 obvious that it's going to have the correct effect, the
3 inadequate effect on U.S. commerce, we don't need to bother
4 with the effects test.

5 But if it's a close call, if it's not crystal clear
6 that the conduct directly targets an import market or
7 possibly, even as the Third Circuit said in Carpet Group,
8 solely targets an import market as the defendants did in that
9 case, the only case plaintiffs cite in which the Court held
10 that yes, the import commerce exception applies, then you've
11 got to get to the effects test.

12 So, the conclusions from the proper construction and
13 application of the operative words from the import commerce
14 exception are: One, the relevant conduct here. The relevant
15 conduct was only the alleged agreement to fix prices, and then
16 the application of that agreement in the imposition of the
17 overcharges. The flying of the planes, the unloading of the
18 cargo, where they went is irrelevant. The harm that
19 plaintiffs are alleging arose from the imposition of the
20 overcharges, and it didn't fly with the cargo in the belly of
21 the aircraft to wherever the aircraft is going.

22 THE COURT: So, your definition of conduct involving
23 trade, to the extent that it applies in this case, is the
24 actual application of the charge to a particular item that's
25 being transported.

1 MR. SCHWARTZ: I think, Your Honor, that there are,
2 that is the second and here the operative element.

3 I think the predicate element has to be the
4 agreement to fix prices, which is the essence of the
5 violation. But obviously, without the imposition, the conduct
6 didn't harm the plaintiffs.

7 THE COURT: Well, but for domestic, for purchases of
8 air transport services occurring domestically, the agreement
9 may have been abroad, it's the imposition of the charge here
10 that you concede gives rise to Sherman Act jurisdiction.

11 MR. SCHWARTZ: That's correct. If it is a domestic
12 transaction. And domestic pricing, presumably applied, so
13 yes, we're not arguing, we're not moving such transactions.

14 THE COURT: Okay.

15 MR. SCHWARTZ: Now, let me just touch briefly. We
16 don't need to go back to the slide.

17 The Kruman transaction, again, plaintiffs tried to
18 distinguish Kruman and Turicentro and CSR by saying all these
19 cases, the facts here unlike the facts here, had only
20 incidental contact with the United States and began and ended
21 in foreign, not domestic commerce.

22 We saw, of course, that's completely incorrect with
23 respect to Charlotte Kruman, with respect to other class
24 representatives. The transaction began and ended with
25 Charlotte Kruman in the United States.

1 THE COURT: But that was a purchase of goods in a
2 foreign market.

3 Here we're talking about a purchase of services
4 which arguably, and I think the plaintiffs argue, actually
5 occurs both places. I mean, the service occurs both abroad
6 and here.

7 MR. SCHWARTZ: Well, I think that the, I have two
8 points about that, Your Honor.

9 I think Kruman is directly analogous to here. What
10 the relevant -- what Charlotte Kruman purchased that was
11 relevant for purpose of plaintiffs' claims, as the Court
12 correctly held, was the purchase of the auction services. The
13 watch came out of that. The plaintiffs in that case were not
14 claiming that Charlotte Kruman or anyone else overpaid for the
15 good, it was for the service being provided at auction.

16 Just as here, plaintiffs are claiming that they
17 overpaid for the service.

18 THE COURT: But the service, again, occurred
19 entirely overseas. The auction occurred over there. I mean,
20 as opposed to the transportation of goods.

21 MR. SCHWARTZ: Well, Your Honor, I respectfully
22 suggest that a very significant part of the defendant's
23 conduct in Kruman occurred in the United States. Christie's
24 New York showed her the watch. Christie's New York took the
25 bid from her. We don't know, it's not addressed, Christie's

1 New York may have actually sent her the bill and received the
2 payment reflecting the overcharge for the buyer's premium.

3 Another named plaintiff, Sophie Magee, resident of
4 Flint, Michigan -- this by the way is in the complaint filed
5 by Cohen & Milstein. Sophie Magee resident of Flint, Michigan
6 wanted to sell paintings at auction. Goes to visit with
7 Sotheby's Chicago. Sotheby's again, is a Michigan company.
8 Makes arrangements to have those paintings auctioned in
9 London. Sotheby's puts them on tour in the United States,
10 Boston, New York and then two foreign cities. Paintings are
11 sold. Allegedly, inflated seller's commission is charged by
12 Sotheby's.

13 Sotheby's had a lot of action in the United States
14 on that transact.

15 Ion, but the relevant conduct was the imposition of
16 the alleged overcharge to the seller's commission in the
17 London auction. So, the conclusion in that case was it
18 doesn't matter; that whatever happened in the United States is
19 not the alleged conduct that violated the Sherman Act.

20 Just as the Second Circuit said in Kruman. It is
21 only that conduct that violated the act that is relevant in
22 applying the narrow threshold import commerce test.
23 Everything else, we don't care about.

24 Just as in Turicentro, a case brought by foreign
25 travel agents against four U.S. carriers in IATA, claiming a

1 conspiracy to fix commissions paid to foreign travel agents.
2 Didn't matter that they're domestic carriers, they're
3 obviously flying in and out of the United States, tickets were
4 sold to U.S. passengers who are coming in and out of the
5 United States. The facts there are directly analogous to
6 those here.

7 Travel agents there play the role of middlemen
8 between the ultimate consumer of the service being provided by
9 the air carrier and the carrier, just as the forwarder does
10 here for the shipment of freight.

11 But, the operative fact is that it was foreign
12 commissions, commissions being paid to foreign travel agents
13 that were fixed in that case. And so, the Court said, it
14 doesn't matter that there were, that defendant had contacts in
15 the U.S., didn't matter there were passengers flying in and
16 out of the U.S., didn't even matter they were U.S. carriers.
17 Just as here, this again could not be more clear when we're
18 talking about the foreign purchasers under Counts 3 through 5.

19 Can we go to the first map slide, please.

20 (The above-referred to slide was published to the
21 courtroom.)

22 MR. SCHWARTZ: It might be helpful, just to
23 illustrate briefly a hypothetical transaction falling within
24 Counts 3 through 5. This is one brought, hypothetically under
25 Count 4, brought by purchasers for shipments between Europe

1 and the United States.

2 So, if a shipper wants to send goods from Spain, and
3 let's assume the forwarder is a direct purchaser claim. The
4 forwarder is the plaintiff. The shipper would contact the
5 forwarder in Spain and reach agreement for a price, a rate,
6 possibly surcharges, here properly denominated in Euros on the
7 agreement.

8 Next slide, please.

9 (The above-referred to slide was published to the
10 courtroom.)

11 MR. SCHWARTZ: The next step would be the freight
12 forwarder, this is the plaintiff, would make arrangements with
13 a carrier. An agreement that would include, of course, what
14 the forwarder's going to ship, crates of wine, to a
15 destination and a price. It would be the rate and it would be
16 the surcharge that the carrier imposed.

17 THE COURT: I see. Okay. Sorry, I did something
18 here.

19 (Discussion held off the record.)

20 (Pause in the proceedings.)

21 THE COURT: Okay. Thank you.

22 MR. SCHWARTZ: Okay, here we go.

23 Of course, the carrier and the forwarder are going
24 to agree on a rate and any applicable surcharges. This is the
25 element of the transaction that allegedly violated the

1 Sherman Act for purpose of this claim. This is the conduct
2 that's relevant.

3 Can we go to the next slide, please.

4 (The above-referred to slide was published to the
5 courtroom.)

6 MR. SCHWARTZ: And the plaintiffs are not contending
7 that they would have a claim for this transaction if the wine
8 was shipped to Dublin.

9 Now, they are seeking relief under the EC Treaty
10 under Article 81, but they concede there's no Sherman Act
11 jurisdiction for this claim.

12 Next slide, please.

13 (The above-referred to slide was published to the
14 courtroom.)

15 MR. SCHWARTZ: And it doesn't matter whether the
16 wine is going to Dublin, or Paris, or Brussels, or Frankfurt,
17 or anywhere else in Europe, it's the exact same result.

18 Next slide please.

19 (The above-referred to slide was published to the
20 courtroom.)

21 MR. SCHWARTZ: And indeed, it doesn't matter whether
22 the wine is shipped to Dublin, or Frankfurt, or Paris, or
23 New Delhi or even New York.

24 The harm was felt with the imposition of the alleged
25 overcharge when the carrier reached agreement with the freight

1 forwarder in Spain.

2 The sole case that the plaintiffs' cite in which the
3 Court held that the import commerce exception applied
4 completely supports these conclusions and the analysis, as
5 reflected in our motion, Your Honor, Carpet Group the Third
6 Circuit decision in Carpet Group.

7 Plaintiff retail rug importer, a rug importer sued
8 an association of wholesaler rug importers. The Oriental Rug
9 Importers Association accused the defendants -- and some of
10 its members and officers -- plaintiff accused the defendants
11 of conspiring to block plaintiff's efforts to import rugs
12 directly from foreign countries and thereby cutting out the
13 wholesaler rug middlemen defendants.

14 The Court held that that conduct involved import
15 commerce because the defendants' conduct solely targeted what
16 was clearly an import market. The defendants describe
17 themselves as importers. The defendants' conduct was targeted
18 directly at reducing imports, the quantity of imports, the
19 volume of imports of rugs into the United States, thereby
20 raising the price, effectively.

21 Interestingly, the Court held that it was because
22 that conduct so directly targeted an import market that the
23 import commerce exception applied. And the Court held that if
24 the defendants had only taken steps to one, prevent or at
25 least dissuade the foreign export countries, Pakistan and

1 India, from supporting the plaintiff's rug trade shows by
2 getting its suppliers in those countries to attend the shows,
3 or two, even if the defendants had only done that and tried to
4 dissuade rug retailers in the U.S. from supporting the
5 plaintiff's shows, even that conduct may have been too
6 indirect standing alone to involve import commerce for purpose
7 of the narrow threshold import commerce exception. It was
8 only because the defendants also targeted their own members
9 and dissuaded them, that was direct enough. This is the only
10 case the plaintiffs cite. The only case.

11 And what we have here is --

12 THE COURT: They were looking at the effects test
13 then; were they not?

14 MR. SCHWARTZ: I believe that they were looking --
15 in the application of the import commerce exception,
16 Your Honor, they were looking solely at the defendants'
17 conduct. They were looking at the conduct.

18 What did the conduct target? What market did it
19 target is the real question.

20 And the Court held properly in that case that
21 defendants' conduct targeted solely what could only be fairly
22 characterized as an import market for rugs.

23 THE COURT: Okay.

24 Maybe you should take a couple minutes on standing
25 and I'll let the plaintiffs respond.

1 MR. SCHWARTZ: If I could very briefly address
2 6(a)(2), Your Honor.

3 THE COURT: Okay.

4 MR. SCHWARTZ: We don't think that there's a
5 legitimate dispute over this. The plaintiffs clearly don't
6 satisfy the proximate cause test, which they must satisfy
7 under the Empagran II test, and which every other court has
8 addressed.

9 The plaintiffs' allegations are, for example, that
10 the defendants' conduct had adverse effects on -- that the
11 adverse effects of defendants' conduct are interdependent
12 with, and are linked between foreign and U.S. commerce.
13 Defendants could not have maintained their international price
14 fixing arrangement without impacting adversely the price of
15 the various freight shipping services to, from, within the
16 U.S. It's all a "but for" test. It's a "but for" argument.
17 It's all the -- it's precisely the kind of "but for"
18 interdependence arbitrage theory that every court to address
19 it, including Ciano, III, and Latino Quimica have properly
20 rejected. And we just don't think there's a legitimate issue
21 at this point.

22 Your Honor, what I would like to do at this point is
23 since standing is, for us, a separate argument, if that's okay
24 with you, is to give the plaintiffs an opportunity to address
25 FTAIA. And then if it's okay, I'll do an encore and address

1 standing, briefly?

2 THE COURT: All right. Let's do it that way.

3 That's fine. Because I'm going to have you back anyway, so.

4 MR. SCHWARTZ: Okay.

5 THE COURT: All right. Mr...

6 MR. TOMPKINS: Tompkins, Your Honor.

7 THE COURT: Tompkins. Yes, thank you.

8 COURTROOM DEPUTY: Counsel, are you using a podium
9 laptop as opposed to the table?

10 MR. TOMPKINS: Laptop.

11 COURTROOM DEPUTY: Okay.

12 (Pause in the proceedings.)

13 ARGUMENT I

14 BY MR. TOMPKINS:

15 MR. TOMPKINS: Well, let me start by saying the
16 plaintiffs and defendants do agree on a number of elements in
17 this case. We apparently agree on -- that's heartening. We
18 apparently agree that the relevant test is whether the conduct
19 involves import commerce.

20 THE COURT: So, are you conceding that you're really
21 not relying on the domestic effects aspect?

22 MR. TOMPKINS: I'm not saying that we don't meet the
23 domestic effects test. However, I am saying we never have to
24 get there.

25 It's a challenging and difficult conceptual analysis

1 that we just don't have to reach because in this case, the
2 question of whether or not the conduct involves import
3 commerce is a pretty straightforward question.

4 And I think the challenge in a case that is as
5 straightforward as this is that the parties are analogizing
6 from hard cases back to easy cases. Some of these hard cases
7 that the parties have been talking about commissions and
8 foreign markets are much more challenging than a case here,
9 which involves an alleged price fix on the cost of shipping a
10 good to the United States.

11 Let me just start by saying, the defendants concede
12 that they challenge they're only moving as to purchases in
13 foreign markets of air freight shipping services for shipments
14 from foreign countries to the U.S. So, what they're
15 challenging is shipping services when goods, imports, are
16 loaded onto planes and flown to the U.S. by air.

17 That makes the analysis much simpler, frankly,
18 because the Kruman's case, and the defendants also -- I won't
19 belabor this point -- the defendants also agree that the
20 question is whether their conduct involved import commerce.

21 I'm going to skip this slide because this analysis
22 is not necessary.

23 So, the question is, what conduct involves import
24 commerce? And that question has essentially already been
25 answered by the Second Circuit in the Kruman's case. If you

1 read the quote there, in the Kruman case, what you were
2 dealing with was a commission that was charged by a service,
3 by an auctioneer basically abroad.

4 What the Court said was that that did not qualify as
5 conduct involving import commerce. And the Court specifically
6 contrasted it with conduct that would involve import commerce.
7 And that would be conduct that involved trade in, and
8 subsequent movement of goods.

9 Now, here, Your Honor, this case involves the
10 subsequent movement of goods into the United States. What the
11 defendants do, the service they provide is to fly goods into
12 the United States. And the conduct was to allegedly increase
13 certain surcharges that increase the cost of flying goods into
14 the United States.

15 THE COURT: But the critical word there is of the
16 goods that were purchased and sold, isn't it? I mean, trade
17 in and subsequent movement of the goods that were purchased
18 and sold. It's not just of, you know, the focus is not on
19 movement. It's on goods.

20 MR. TOMPKINS: Your Honor, the focus is on what
21 involves import commerce. And it's important to think about
22 the fact that that's a phrase, not a word. It's not just
23 imports, obviously. It's something that is broader than that.
24 And the question is: What conduct involves import commerce?
25 Well, obviously, fixing the price of imports does. But

1 something else has to, as well, because otherwise the phrase
2 wouldn't be involves import commerce, it would be imports.

3 And the question is: If conduct targeting the cost
4 of shipping a good into the United States doesn't involve an
5 import commerce, what would? It seems like this is a
6 clear-cut case.

7 But what the defendants have done is they have
8 agreed among themselves to increase the cost for an importer
9 who wants to ship something here. That should be conduct that
10 involves import commerce under any reasonable application of
11 that phrase.

12 And importantly, it's conduct that the
13 Second Circuit has already indicated is at least sufficient.
14 I'm not suggesting this sets the outer bounds of what might
15 qualify as involving import commerce, but I am saying that
16 this identifies examples of conduct that does involve import
17 commerce. And one of the examples is commerce directed at the
18 subsequent movement of goods into the United States.

19 Does that answer your question?

20 THE COURT: It answers up to a point. But no, it
21 ultimately, everything turns, it seems to me, on whether the
22 providing of that service, whether the, for the Court -- what
23 I'm grappling with is where is the service provided, and what
24 is, what is the market for the service, and where is that
25 market? And I'm not sure that either side has yet helped me

1 find the solution to that question.

2 MR. TOMPKINS: Let me try and address that question
3 first by focusing on the word conduct, per se.

4 The defendants' conduct under Mr. Schwartz' analysis
5 was fixing the service provided abroad. That definition is
6 clearly too narrow because if that definition applied, then
7 you could fix the price of an actual import abroad, let's say
8 the wine example. You fix a price for a case of wine and then
9 ship it to the United States. I mean, that would be --
10 clearly, fixing the price of a case of wine that is shipped to
11 the United States involves import commerce. It seems like
12 that must, if anything does.

13 So, looking at the conduct as merely being the fix
14 in a foreign location cannot be the correct analysis.

15 What you have --

16 THE COURT: But let's take the Kruman's case. The
17 Kruman's case, the price of the good was fixed abroad. Now,
18 the good could have gone anywhere. It wasn't found for the
19 United States, necessarily, could have gone anywhere. But,
20 the price was fixed abroad, brought to the United States. The
21 United States purchaser of the good was affected by that.

22 So, why isn't that actionable? I mean, you're
23 saying if the price is fixed abroad and comes to the
24 United States, it's actionable under the Sherman Act.

25 MR. TOMPKINS: Well, if the price of the import is

1 fixed abroad and it comes into the United States, that's
2 conduct involving import commerce.

3 But to answer your questions about Kruman's, the
4 service, the service there was providing an auction service.
5 It occurred exclusively in the foreign market. The auction
6 took place in a foreign market, it was completed in foreign
7 market. And when it was done, the good could be shipped
8 anywhere.

9 THE COURT: You're right.

10 MR. TOMPKINS: If you paid a hundred Euros for the
11 good, you could ship it to the United States or you could ship
12 it France.

13 Here, the service that is being provided is the
14 service of shipping something to the United States. I think
15 the way we expressed in the briefs is this: In the Kruman's
16 case, once the auctioneer finished and the good was sold, the
17 service was done. You could not complain to the auctioneer
18 about the service being inadequately performed. There was
19 nothing left to do.

20 Here, once I pay for my, the shipment in England or
21 in Spain -- the plane has to fly to the United States and
22 arrive in the United States for the transaction to be
23 complete. To put it in the most concrete terms, in Kruman's,
24 once I buy the auctioned good, no matter where it goes, I
25 can't go back to the auctioneer and say give me my money back

1 because the auctioneer has performed the service that he or
2 she was hired to perform.

3 Here, in contrast, if the defendant didn't fly the
4 good to the United States, you could get your money back. And
5 that makes a big difference in the analysis. The service is
6 provided, it starts abroad, but it ends in the United States
7 by definition.

8 THE COURT: I understand.

9 MR. TOMPKINS: Okay.

10 I think one point to highlight is that this case is,
11 because it involves the transportation industry, it is very
12 different than these other cases that have been analyzed. And
13 I think it's one of the -- that was one of my opening points
14 was that it's hard to take cases involving the Kruman's and
15 Turicentro case. At their heart they stand for the
16 proposition that you can fix the price of foreign auction, you
17 can fix the charge for a foreign auctioneer's services, and it
18 doesn't matter where the product is shipped. Excuse me,
19 commissioned. A foreign commission can be fixed. Kruman's
20 involves auctions. Turicentro involves travel agents, but
21 essentially, you can fix the commission charged by a foreign
22 agent.

23 These cases are different, because what's being
24 fixed here is the cost of shipping something into the United
25 States. So, you can't take those Kruman and Turicentro cases

1 too far or else you leave no conduct left that quote, involves
2 import commerce.

3 And again, I come back to the point that the conduct
4 in this case targeted the movement of goods into the
5 United States. That's the target. The service for the
6 movement of goods into the United States was targeted by
7 defendants' conduct. In fact, let me go to the next slide
8 here to highlight this point.

9 One of the specific allegations in the complaint is
10 that the defendants agreed to charge flat fees to air freight
11 customers for the defendants' preparation and submission of
12 U.S. Customs required manifests. And let me just explain that
13 for a second.

14 After 9/11, the U.S. Customs Department began to
15 require that the air carriers, while they were en route,
16 provide a manifest of all the goods on their plane. It only
17 applied to the United States. It was a requirement that U.S.
18 Customs instituted and only obviously was applicable to
19 flights coming here.

20 The defendants first decided that they wanted to
21 impose a surcharge to recapture the cost of complying with
22 that requirement. And then, they, at least allegedly in the
23 complaint, they agreed on the amount of that surcharge.

24 Now, it's hard to imagine conduct more clearly
25 targeting the United States market, more clearly targeting the

1 market for United States' imports than an agreement by the
2 defendants to fix the actual cost of complying with U.S.
3 Customs requirements that are required of importers to the
4 United States.

5 So, to argue that this is somehow was a conspiracy
6 targeting a foreign market is just not patently plausible.

7 THE COURT: At least that aspect of it as opposed to
8 some of the other surcharges.

9 MR. TOMPKINS: The fuel surcharge, for example, it's
10 not as clear because it doesn't have U.S. Customs in the
11 title, but the surcharge is for the cost of fuel of flying the
12 plane to the United States. The fuel wouldn't be expended if
13 the plane wasn't flying here. When the price of fuel rose,
14 the defendants agreed among themselves to recapture those
15 costs.

16 THE COURT: But the fuel surcharges applied across
17 the board. It wasn't targeted at shipments to the
18 United States. As I understand it, it was targeted to
19 shipments anywhere.

20 So, to the extent, I'm taking from your argument
21 that you're focusing on the case that you cited, and the
22 defendants were distinguishing with respect to the targeting
23 of the, any competitive conduct of price fixing to the
24 United States market, but go ahead.

25 MR. TOMPKINS: Well, let me be clear. The fuel

1 surcharge did apply no matter where the goods were going, but
2 plaintiffs are only seeking relief under the Sherman Act for
3 the fuel surcharges that were applied to shipments into the
4 United States. For those fuel surcharges, the charge itself
5 was a charge imposed to recapture the cost of flying here.
6 And in that case, it was clearly directed at U.S. commerce.

7 I mean, you are correct that a fuel surcharge
8 directed at a flight into China, for example, might affect
9 Chinese commerce. But here we're limited to flights within
10 the United States, and so it did target U.S. commerce.

11 THE COURT: I understand.

12 MR. TOMPKINS: I also note that the defendants'
13 argument regarding the tax statute -- let me move on to that
14 for a second, because it's one of the highlights of the
15 argument. That is, you have to read the term "involved" --
16 the phrase "involves import commerce" narrowly in order to
17 give meaning to the second prong of the statute.

18 There are two points to make with that: One, the
19 defendants aren't reading the phrase "involves import
20 commerce" over broadly. They're reading the phrase "involves
21 import commerce" to include conduct directed at the market for
22 imports, or the market for the subsequent movement of imports
23 into the United States. That leaves lots of conduct that
24 potentially could have a direct, you know, foreseeable effect
25 on the U.S. import market, but does not itself involve the

1 U.S. import market.

2 And two examples of that are actually contained in
3 the Department of Justice Antitrust Enforcement Guidelines,
4 which are foreign vertical restrictions, and certain
5 intellectual property licenses might be conduct that would not
6 involve U.S. import market, but could nevertheless have a
7 direct and foreseeable effect on the U.S. import market.

8 I only raise these examples to address this, the
9 statutory concerns the defendants raise. It really is not --
10 it has no weight because plaintiffs' reading of the import
11 commerce exception is not nearly as broad as the defendants
12 would suggest.

13 THE COURT: What is the, moving to the standing
14 argument -- what is the antitrust injury here for the foreign
15 purchased service?

16 MR. TOMPKINS: The foreign purchased service suffer
17 the same antitrust injury as the domestic purchaser. They
18 paid more to ship goods into the United States than they would
19 have otherwise.

20 In the context of import commerce, it's important to
21 remember --

22 THE COURT: But why is that an antitrust injury here
23 if the foreign purchaser is purchasing it overseas?

24 MR. TOMPKINS: Two reasons: One, because Congress
25 passed the FTAIA and specifically excluded from its gamut

1 conduct involving the import commerce market. That is -- a
2 harm directed at the U.S. import market is going to, almost by
3 definition, be a harm directed to some degree, to a large
4 degree, at U.S. importers who are themselves likely to be
5 foreign entities.

6 THE COURT: So, are you saying that once -- that
7 there is no separate -- once the Court finds, if it does, that
8 the FTAIA does not bar the claims here, then it necessarily
9 follows that there is antitrust standing.

10 MR. TOMPKINS: In the context of this case, yes,
11 Your Honor. I'm not sure. There may be certain cases out
12 there. I know the defendants have not cited any cases where
13 the manufactures have satisfied the FTAIA and then failed the
14 standing test. The cases that are cited are cases where
15 essentially, the standing analysis just follows on.

16 THE COURT: Okay. So, the antitrust injury here is
17 the fact that somebody in the United States is going to pay
18 more because there's a bigger charge on the transportation of
19 goods to the United States?

20 MR. TOMPKINS: The antitrust injury to the
21 plaintiffs -- remember, the domicile of the plaintiff is
22 irrelevant to the analysis.

23 The antitrust injury to the plaintiffs is that they
24 paid more to ship goods to the U.S. than they would have
25 otherwise.

1 THE COURT: But the antitrust injury has to be here,
2 as I understand. Doesn't it? It has to occur here.

3 MR. TOMPKINS: I'm not sure I understand the
4 question, Your Honor. The antitrust -- I mean, the injury to
5 the U.S. economy --

6 THE COURT: Yes.

7 MR. TOMPKINS: Okay. I'm sorry.

8 The injury to the U.S. economy is that it costs more
9 to ship goods to the U.S. than it otherwise would have, but
10 it's the same injury that occurred to the importers. It costs
11 them more to ship goods here. The U.S. economy is invariably
12 harmed by an agreement to increase the cost of importing goods
13 here. That's precisely why, as Mr. Schwartz conceded,
14 Congress created an exception for the FTAIA for import
15 commerce. It's a quick look, as he said. If something
16 involves import commission, it's got to have a direct and
17 reasonably foreseeable effect on U.S. commerce. Because
18 fixing the cost of bringing goods here impacts U.S. commerce
19 almost by definition. That's why it's excluded.

20 Does that answer your question?

21 THE COURT: I'm not sure it does. I think what
22 you're saying, it comes back to, to whether or not the Court
23 finds that this involves import commerce. If it involves
24 import trade or commerce, then you're saying, by definition,
25 therefore, it must be an antitrust injury for purposes -- an

1 United States anti trust injury as opposed to foreign anti trust
2 injury.

3 MR. TOMPKINS: I think that's the importance of the
4 import commerce exclusion, Your Honor. There's two ways that
5 you can have an anti trust claim for a foreign -- involving a
6 foreign entity.

7 One is, if you meet the two-prong test. And that is
8 a test designed by its very nature to determine whether there
9 is impact, sufficient impact, on U.S. commerce. That's in the
10 first prong of the test.

11 But the other way to satisfy that is to show that
12 the conduct involved an import market. As Mr. Schwartz said,
13 you don't have to do any more because once you know the
14 conduct involved the U.S. import market, it, by definition,
15 harmed U.S. commerce. That's why Congress wrote that
16 exclusion in the first place.

17 And to go through to the standing analysis, the
18 plaintiffs have alleged an anti trust injury, which is they
19 paid too much for their goods. And critically, they're not
20 only the most efficient enforcers, they're really the only
21 enforcers. And this is something that has to be considered in
22 light of the nature of imports.

23 Congress has said that conduct involving import
24 commerce is unlawful. There is no body, no entity that can
25 force and seek redress for that conduct except for importers.

1 And importers are largely going to be foreign entities. That
2 is one thing we agree on.

3 So, there is no effective means of redress if the
4 plaintiffs here aren't allowed to bring their claims. Not
5 only are they the most efficient enforcers, if they aren't
6 permitted to enforce their plans, what will end up happening
7 is all the purchases for inbound shipments that occurred
8 abroad, which was most of the purchases, there will be no
9 ability for any plaintiff to claim damages based on those
10 purchases.

11 THE COURT: At least not here.

12 MR. TOMPKINS: Well.

13 THE COURT: They could presumably, assert the claims
14 overseas.

15 MR. TOMPKINS: But the assertion of the claims
16 overseas isn't going to redress the harm to U.S. commerce
17 necessarily, especially not in the fashion that Congress
18 intended it. I mean, the Sherman Act sets up a system that is
19 designed to deter and redress violations that impact U.S.
20 commerce. And Congress has decreed that conduct involving
21 U.S. commerce creates that requisite impact.

22 THE COURT: I understand.

23 MR. TOMPKINS: And so, in order to enforce that
24 intent of Congress, the importers in this case have to be
25 allowed to bring their claims. If they're not, they'll be

1 under deterrence within the United States, under deterrence on
2 the effect of U.S. commerce.

3 Remember, U.S. commerce was affected by the
4 inter-shipping costs. The amount of that effect cannot be
5 redressed unless the importers are allowed to pursue their
6 claims.

7 THE COURT: All right. Thank you.

8 Mr. Schwarz? Yes, I'll give you five minutes or so.

9 MR. SCHWARTZ: Very briefly, Your Honor.

10 ARGUMENT I

11 BY MR. SCHWARTZ:

12 MR. SCHWARTZ: First, I'd like to respond briefly to
13 some of the FTAIA arguments made by Mr. Tompkins.

14 First, Mr. Tompkins made the point that because this
15 case involves the substantive movement of goods, that that
16 must involve -- in effect, Defendants' conduct must involve
17 import commerce. But that argument is completely contrary to
18 the holding in Turicentro. It must be construed narrowly or
19 there's nothing left to analyze for import commerce in the
20 effects test of 6(a)(1). It has to be much more narrow than
21 Mr. Tompkins is arguing. And plaintiffs did not address that
22 point for the Turicentro Court's holding in their opposition.

23 Second, when plaintiffs argue that this conduct must
24 involve import commerce to the U.S. because the conduct
25 increased the price of shipping goods to the U.S., that's an

1 effects argument. You don't get to that issue unless the
2 conduct falls within the scope of the FTAIA and is subjected
3 to the effects test codified in 6(a)(1) and 6(a)(2).

4 THE COURT: Well, but I understand the distinction
5 you're making between the effects test and the first part of
6 the FTAIA definition of what's barred, or remains under the
7 Sherman Act.

8 It's, it's hard to keep this all straight in terms
9 of the negatives. The FTAIA bars jurisdiction except for
10 import commerce.

11 But in any event, but one way to try to define
12 whether it's import commerce or not is whether or not it does,
13 in fact, affect the price of goods here.

14 I mean that's their argument, I think. It's, you
15 know, how to define what is, what does import commerce, what
16 does that phrase encompass, import trade and import commerce,
17 what does it encompass. Well, they will argue that it
18 encompasses anything that, in fact, affects the price of goods
19 that are imported into the United States.

20 MR. SCHWARTZ: That does seem to be their argument,
21 but I think it's completely contrary to the proper application
22 of the import commerce exception. Because the exception
23 applies only where the defendant's conduct directly targets an
24 import market, and the conduct --

25 THE COURT: Well, what about the surcharge for, you

1 know, the manifest, the cost of manifest, the surcharge of the
2 manifest, directly targets the imports to the United States.

3 MR. SCHWARTZ: Where a foreign freight, freight
4 forwarder, let's say someone in Spain, contacts, makes an
5 agreement with the carrier in Spain to pay any, whatever the
6 price is, the all-in price, which would include the rate, and
7 surcharges, fuel surcharge, whatever else was applied,
8 including this, maybe it's called a Customs surcharge --

9 THE COURT: Yes.

10 MR. SCHWARTZ: -- the carrier is still setting the
11 price and applying the price in Spain.

12 Just as Mr. Tompkins said, it really is just like
13 the fuel surcharge. The fuel wouldn't be expended if the
14 plane wasn't going to the United States. And maybe even
15 there's some relationship between the amount of fuel surcharge
16 imposed on shipments originating from Spain with fuel costs in
17 the U.S. We don't know. It doesn't matter. Just like it
18 doesn't matter --

19 THE COURT: What if the contracting is done abroad
20 for the provision of services entirely within the United
21 States.

22 I mean, I don't know, let's say somebody -- you
23 contract with a foreign construction company to build
24 something here in the United States. And they fix the price
25 abroad, but the services are all provided here, as opposed to

1 this. I mean, here we have services provided, they would
2 argue in two places. I mean, both abroad and here.

3 And anyway, I'm struggling with where the service,
4 to some extent, where the service is provided, and how that
5 affects the definition of import commerce.

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7 (Continued on following page.)

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1 ARGUMENT I

2 BY MR. SCHWARTZ: (Continuing.)

3 MR. SCHWARTZ: (Continuing.) Well, maybe.

4 THE COURT: And how that affects the definition of
5 import commerce.

6 MR. SCHWARTZ: I think I can directly address that
7 issue, Your Honor, in the follow way.

8 The Court doesn't need to look at that to find
9 where, and in what places, was most of the conduct. It's just
10 like in Kruman, arguably there was a whole lot more conduct by
11 the defendants in the United States than in London, but it
12 didn't matter because the service, the crux of the plaintiffs'
13 claim for purposes of foreign auction purchases of services
14 was overseas.

15 Just like here where we're talking about the
16 purchase of air cargo services originating from overseas, the
17 only conduct that's relevant is the imposition of a surcharge.
18 It doesn't matter that defendants spent a whole lot of time
19 building terminals, hiring and firing employees in the U.S.,
20 unloading cargo. It's not the source of plaintiffs' injury,
21 that's not the nature of the alleged violation.

22 In going to your hypothetical about the
23 construction that actually is the plaintiffs', what we refer
24 to as the "American in Paris." An American travels to Paris
25 and make arrangements for the shipment of goods from the

1 United States. We're not moving as to that, we would say
2 that's domestic commerce. And it's not an export, it's not an
3 export just like the transaction subject to our motion that's
4 domestic. The transactions as to which we are moving are
5 foreign.

6 Transportation. It's true transportation, by
7 definition, involves movement from point A to point B. The
8 Court doesn't need to find a geographical nexus anymore than
9 the Court did in Touricentro. It only mattered that foreign
10 commissions being fixed.

11 THE COURT: Take just a moment on the notion that if
12 it involves import commerce, antitrust automatically follows.

13 MR. SCHWARTZ: Well, first, it's clearly not true
14 that the jurisdictional analysis drives the standing analysis.
15 In fact, there is one case of the Galvin Supplement that we
16 cited in our papers in which the Court held there was subject
17 matter jurisdiction but there was no standing.

18 The Court in the Microsoft case, in In Re:
19 Microsoft did not address whether or not there was subject
20 matter jurisdiction, it went directly to the standing point.
21 And, what the -- and what the plaintiffs' argument that if the
22 conduct, the defendants' conduct, involves import commerce,
23 they must have standing that's clearly incorrect. It may mean
24 that somebody has standing, it doesn't mean --

25 THE COURT: Well, who else? I mean, aren't they the

1 ones suffering the injury.

2 MR. SCHWARTZ: Well, there would be domestic
3 purchasers who might be better suited to actually bring the
4 claim, who might be the more efficient enforcers. It doesn't
5 mean that either of their claims can be directly tied,
6 directly tied to the conduct affecting U.S. commerce because
7 it's an injury test. It's really an effect test, and the
8 Court doesn't need to get to that in reaching the import
9 commerce test.

10 I want to make one point in response to
11 Mr. Tompkins's point that these claims are really drawn from
12 Kruman.

13 These goods are coming into the United States
14 and the transaction there ended when the auction gavel went
15 down and it was over; and here it's very different. The goods
16 are coming into the U.S. It's directly analogous if Charlotte
17 Kruman, instead of getting her antique watch that she bought,
18 got a \$29 Seiko in the box. I don't think that she would have
19 considered the transaction to be over.

20 In fact, the plaintiffs argue on appeal in
21 Kruman, and we have a copy of the brief if Your Honor would
22 like one, that had jurisdictional discovery been permitted in
23 that case, the plaintiffs would have been able to show that
24 the defendants were directly involved in the shipping of the
25 goods in that case in helping the plaintiffs work through

1 customs and arranging transportation and they said expressly
2 in their brief that was part of the services that the
3 defendants were providing exactly here.

4 The Court didn't need to get into that inquiry.
5 The Court did not need to let the parties engage in discovery
6 to address that issue. It did not matter that the defendants
7 in that case were involved in shipping goods, the stuff came
8 to the U.S. any more than it matters here. On the customs
9 side, it's all part of the price. Again, it's just like the
10 fuel surcharge.

11 THE COURT: Okay. Let's take just a brief recess
12 and did you want to say one thing, Mr. Tompkins?

13 MR. TOMPKINS: I have one minute.

14 THE COURT: I will give you a brief recess.

15 ARGUMENT I

16 BY MR. TOMPKINS

17 MR. TOMPKINS: Your Honor, I want to clarify one
18 point.

19 The plaintiffs' argument is not that it
20 increases the cost of goods imported into the United States.
21 I mean, that's certainly likely to be the case, but it's the
22 defendants' conspiracy increased the cost of the service. It
23 increased the cost of the service, and the service here is
24 shipping goods into the United States.

25 I want to make that distinction very clear

1 because the nature of the service is what's critical to the
2 import analysis. A service that is directed and the
3 subsequent movement into the United States is import commerce
4 and it's different than auctioneering services provided in
5 these other cases and because it's different, it does involve
6 import commerce.

7 It doesn't matter whether they are ultimately
8 goods or ultimately the price was increased, that's probably
9 true. What matters is it costs more to fly it here and that
10 by definition involves import commerce. It's the process of
11 importing paid for by importers to carriers who bring things
12 here which is to import it.

13 Did I take more than 60 seconds?

14 THE COURT: I don't think so. Well, you know, quick
15 question.

16 If it's a foreign exporter who's paying the
17 charge, right, for the shipping? Why is that -- you're saying
18 it's the importing. We're take Counts 3 through 5.

19 MR. TOMPKINS: Yes.

20 THE COURT: They have a foreign purchaser of the
21 services purchasing. Why does that have any -- isn't that too
22 indirect in terms of the injury here.

23 MR. TOMPKINS: No. In fact, Your Honor, it's the
24 only entity that can bring a direct claim.

25 THE COURT: They can bring a direct claim over in

1 Europe.

2 MR. TOMPKINS: That's true, Your Honor.

3 THE COURT: The fact -- I mean, the distinction
4 that's drawn is not because I don't understand the anti-trust
5 laws to be such that, well, we have to give them a forum to
6 bring their claims if they have a claim.

7 MR. TOMPKINS: But, Your Honor, a claim in Europe
8 isn't going to address the harm to U.S. commerce. Remember
9 that for a flight to the U.S. --

10 THE COURT: But, I mean, the harm to U.S. commerce,
11 that's where I'm having a little difficulty, particularly,
12 where you have a foreign purchaser. Where you have a foreign
13 purchaser what is -- what's the harm to U.S. commerce.

14 MR. TOMPKINS: The harm to U.S. commerce is if you
15 view them simply whether or not they are domestic or foreign.
16 What harm is it if it costs more to bring goods into the
17 United States.

18 THE COURT: Okay.

19 MR. TOMPKINS: The --

20 THE COURT: I understand. Okay. So, let's take a
21 brief recess. Let's get back in seven or eight minutes, so
22 11:30.

23 (Recess taken.)

24 (Judge VIKTOR V. POHORELSKY takes the bench.)

25 THE COURT: All right. Let's see, Mr. Sherman, is

1 it who will be handle the Twombly, the §12(b)(6) issue.

2 ARGUMENT II

3 BY MR. SHERMAN

4 MR. SHERMAN: Good morning, Your Honor. William
5 Sherman from the firm of Latham & Watkins. I represent
6 Singapore Air who will be arguing on behalf of the Twombly
7 Rule 8 issue.

8 I apologize, I don't have any audiovisual
9 matter for the Court. I am going to try to keep you
10 interested with the force of my argument.

11 THE COURT: Okay.

12 MR. SHERMAN: And actually, Your Honor, I want to
13 start by saying this really should be referred to as the
14 Twombly and In Re: Elevator argument because the Court is
15 obviously well aware of the Twombly decision and the Second
16 Circuit's decision in In Re: Elevator Antitrust Litigation
17 last fall following Twombly.

18 Those two cases from the Supreme Court and the
19 Second Circuit really set the stage here for the Court's
20 evaluation of the plaintiffs' complaint and really mandate its
21 dismissal.

22 Now, the Court, as the Court is aware, the
23 Supreme Court's decision in Twombly has established the
24 standard for courts considering a motion to dismiss in
25 antitrust class actions. Twombly is important here in after

1 the last two respects.

2 First, Twombly holds that plaintiffs can't
3 simply advance conclusory allegations. Rather, with respect
4 to the Section 1 claim they must quote, "Stating a claim
5 requires a complaint with enough factual matter taken as true,
6 to suggest an agreement was made."

7 THE COURT: What more would they have to do here?
8 They're specific enough in that they talk about agreements to
9 fix surcharges, a variety of surcharges. They specify the
10 surcharges, they also said there was agreements on allocating
11 customers.

12 So, what more factual detail does Twombly
13 require?

14 MR. SHERMAN: Well, Your Honor, I'm going to break
15 that into two separate answers with respect to the
16 non-surcharge allegations and the surcharge allegations.

17 THE COURT: Okay.

18 MR. SHERMAN: First, let me answer generally your
19 question, because what the plaintiffs allege with respect to
20 all of their allegations is very, very little in the way of
21 actual factual material that the Supreme Court required and
22 In Re: Elevator required.

23 Those factual allegations where they actually
24 allege facts such as a five cent surcharge or a 15 cent
25 surcharge are what I understand put into essentially three or

1 four paragraphs in the complaint all with respect to surcharge
2 allegations.

3 For the rest, it's exactly the sort of
4 conclusory allegations that the Supreme Court in the Second
5 Circuit say are not enough. They're formulaic recitations of
6 "Defendants conspired," "Defendants met and agreed," but there
7 isn't the factual material, the factual material to give, to
8 give flavor to that.

9 Now, what could they have done? Well,
10 traditionally, what plaintiffs do in these sorts of cases they
11 allege parallel conduct. Now, the Supreme Court has said,
12 "No." Not in Monsanto, Matsushita, and now Twombly. But
13 plaintiffs could have alleged, well, the defendants set
14 surcharges and here they are, here are the surcharges, and you
15 will see that there are parallel surcharges they were raised
16 at the same time, parallel conduct.

17 They allege, for example, that there was a
18 refusal to discount. Well, certainly, within their
19 information would be the ability to say -- because they're the
20 freight forwarders -- "Here are our usual discounts," "Here
21 are the discounts we got in the past," "Here, starting at this
22 point we got into discounts."

23 None of that sort of thing is in the complaint.
24 Was there an opportunity to form a conspiracy? Well, the
25 plaintiffs say defendants met and conspired, but there's

1 nothing about when and where.

2 Now, several courts have said, "You're not
3 required to give us the facts of all the secret meetings," but
4 certainly plaintiffs are required to give some factual
5 material. Were there trade association meetings? Were there
6 other opportunities that defendants could have met and
7 supposedly carried out this conspiracy? Again, that was not
8 enough of an opportunity but these are the sorts of factual
9 material that the Supreme Court and the Second Circuit would
10 presumably accept.

11 Other plus factors of the these are all
12 traditional ways of alleging. None of this is in the
13 complaint, Your Honor, it's all just a little formulaic.
14 "They conspired; they agreed," that simply is not enough.

15 Now, let me take it in the two sections because
16 there really is a difference with respect to the non-surge
17 allegations.

18 On refusal to discount which is contained in
19 three paragraphs. On concerted increase in yields, whatever
20 that means, and it's not explained in the complaint, addressed
21 in three paragraphs. The allegation of customers in two
22 paragraphs. In all of those allegations, there's no factual
23 material at all. There's not even the minimal factual
24 material they give us with respect to surcharges, it's simply
25 three conclusory paragraphs.

1 "Defendants met and communicated or met and
2 discussed and jointly agreed," and frankly plaintiffs don't
3 seriously argue that they give you factual material in there.
4 They don't disagree with us, there's nothing there.

5 What they do is try to save those by saying
6 they're synergies. They're synergies between these
7 allegations and the surcharge allegations, so you should
8 ignore the fact that we don't give you have any factual
9 material on these non-surcharge allegations. Well, there's no
10 case that says they're allowed to do that, and respectfully,
11 the Supreme Court and the Second Circuit decision suggest they
12 can't. Either they have factual materials to flesh out the
13 claims or they don't and they don't.

14 Now, just a word on this the synergies, because
15 the synergistic effect that plaintiffs want to use to keep
16 those, those non-surcharge allegations in the complaint.

17 First, there's nothing. Not only is there
18 nothing about the factual material for non-surcharge
19 allegations, there's nothing in the complaint to suggest that
20 they're in any way tied to the surcharge allegations. In
21 other words, in their briefs they say, "Well, there is an
22 synergistic effect," but you can search the complaint in vain
23 to find any suggestion in their factual allegations that
24 there's any such effect.

25 Second, if one of the claims is deficient you

1 can't save it by tying it to another one; and this sort of
2 turns on the one case plaintiffs cite for this synergistic
3 effect which is the Continental case, but that case doesn't
4 apply here. That's a case where the Supreme Court looked at
5 the proof put into the case and the Ninth Circuit looked at
6 the proof at the end of case. It says nothing about the
7 requirements in pleading and to the extent that it would apply
8 here.

9 The Second Circuit has clarified in
10 Northeastern Telephone where they have say in numerous
11 respects, Northeastern's proof was utterly lacking. Under
12 such circumstances, treating Northeastern's claims
13 collectively could not have any synergistic effect of, well,
14 that's directly relevant here, Your Honor, when they got
15 claims are factual material. They simply have no way to keep
16 them in the case by putting them into their surcharge
17 allegations.

18 Now, let me talk for a second by the surcharge
19 allegations because there is a minimal amount of factual
20 allegation for actual surcharges; it's essentially in two
21 paragraphs.

22 They allege a four-step increase program, five
23 cents per step. Security surcharge: They make a minimal
24 factual allegation and the same with their customers
25 surcharges.

1 Now, we believe that those are not sufficient
2 under either Twombly or In Re: Elevator, but what we really
3 take exception with, in terms of those surcharge allegations,
4 is that there's absolutely nothing tying the allegations to
5 any of the particular defendants.

6 It's simply a blunderbuss allegation, nothing
7 about who did what or when. And, again, this is the sort of
8 factual material that they could have supplied that the
9 Supreme Court would request, and the Second Circuit, this is
10 where In Re: Elevator really is right on point because there
11 are very similar allegations in In Re: Elevator.

12 There, the plaintiffs allege that defendants
13 participated in meetings in the United States and Europe to
14 discuss pricing and market divisions. They agreed to fix the
15 price of elevators and services. They rigged bids for sales
16 and maintenance; exchanged price quotes; allocated market;
17 elusively required customers to enter long-term maintenance
18 contracts; collectively took actions to drive independent
19 repair companies out of business.

20 If anything, if anything, much more factual
21 detail and factual matter than we have here; and yet, the
22 Second Circuit said the list is in entirely general terms
23 without any specification of any particular activities by any
24 particular defendant and the Second Circuit affirmed the
25 dismissal of the complaint without leave to replead.

1 THE COURT: Would it be your argument that the
2 plaintiffs would have to allege with specificity some conduct
3 by each individual defendant?

4 In other words, say something that each
5 individual defendant did that they have to, that they can't
6 just say, "Defendants agreed."

7 MR. SHERMAN: Absolutely, Your Honor. Absolutely.
8 That's what In Re: Elevator stands for. We cite a number
9 cases in our briefs which stand for the same proposition but
10 that's the most recent pronouncement by the Second Circuit on
11 that issue.

12 THE COURT: Now, how far does it get there?

13 MR. SHERMAN: I'm sorry.

14 THE COURT: Go ahead.

15 MR. SHERMAN: That's the question. The questions
16 is: How much do they have to say?

17 THE COURT: How far does it get them when they got
18 four defendants who already said we've agreed; we did.

19 MR. SHERMAN: Yes.

20 THE COURT: So, and they -- so they've -- it seems
21 like that gets them pretty far down the road of talking about,
22 at least with those four defendants, that they specifically
23 agreed as to various matters.

24 MR. SHERMAN: And the key to that, Your Honor, I
25 agree with you at least, as it applies to those four

1 defendants, it gets them started down the road.

2 Now, does it exclude, does it excuse their need
3 and the obligation to put it in their pleading, no. No, it
4 doesn't. The Supreme Court has never said that if there's an
5 amnesty applicant or if there is a guilty plea. It relieves a
6 plaintiff of putting factual material in their complaint; it
7 certainly doesn't. It gets them down the road, presumably, of
8 being able to make those factual allegations but they haven't
9 here, they haven't.

10 And certainly, certainly, it cannot be the
11 case -- and this seems to be plaintiffs argument -- because
12 they have continually referenced the "Lufthansa Amnesty
13 Application" and the guilty pleas. But that cannot be the
14 case if a defendant seeks amnesty or if a defendant pleads
15 guilty; that, then plaintiffs can file a case against the
16 entire industry and say, "Well, it's enough, we've got someone
17 who has pleaded guilty; there has to be something to connect
18 everyone else to those guilty pleas."

19 And, frankly, the pleas themselves don't do it
20 because the pleas do not say we conspired with the entire
21 industry. The pleas have of a component, a geographic
22 component. Three of the pleas specifically refer to Trans
23 Pacific, the plea of B.A.

24 Although the component is necessarily in the
25 plea, this discussion of their flights from the U.S. to Great

1 Britain, but there is nothing to suggest there is a conspiracy
2 with the entire industry. There is nothing to suggest a
3 conspiracy over a worldwide commerce as plaintiffs have
4 alleged here.

5 In fact, Lufthansa came into court and told
6 Your Honor that the information that they had would probably
7 exonerate some of the defendants in the face of that. It
8 can't simply be the case and the guilty pleas and Lufthansa's
9 amnesty application isn't enough when they haven't alleged
10 anything about the particular carriers.

11 And just on that for a second. The plaintiffs,
12 of course, answered this which say, "Well, we don't need to
13 say anything specific because we allege that all the carriers
14 did this."

15 Well, that's not enough, Your Honor. Again, it
16 goes back to the conclusory allegation, and frankly, some of
17 their complaint belies that because they, in some cases, say
18 that certain surcharges were not applied uniformly. They say
19 with respect to the security surcharge, with a few exceptions,
20 the defendants did this.

21 So, even their own complaint by its terms
22 doesn't allow them to say that everybody did everything. And,
23 the question of how and why a carrier that doesn't fly, for
24 example, a Trans Pacific flight would have had conspired with
25 the airlines that do it is never explained by the plaintiffs.

1 There is simply no factual material to support that sort of
2 conclusory statement that "Everybody did it and this is the
3 nature of the industry." And, in fact, Mr. Schwartz has spent
4 some time with you this morning about the nature of the
5 industry is here to here, point to here.

6 There are different markets from, for example,
7 or different city pairs where you're shipping from point A to
8 point B. There's nothing to suggest that a carrier shipping
9 Trans Pacific would have any reason or any ability to conspire
10 with a carrier who is shipping, say, from South America to
11 Africa. There is simply nothing there and plaintiffs have
12 given you nothing.

13 THE COURT: So, you're suggesting that there would
14 be multiple small conspiracies here with --

15 MR. SHERMAN: I'm obviously not suggesting that.

16 THE COURT: You're not suggesting that, but the
17 Court ought to look at it in terms of what that the conspiracy
18 couldn't possibly be global because there aren't and many of
19 the carriers only operate in certain regions.

20 MR. SHERMAN: That's exactly right, and there is
21 nothing here to asking you that. Let's not forget they
22 brought 30 something carriers into this case without any
23 reason to suggest that there's a reason to do it.

24 And another point that the Court made in
25 Twombly is especially important here because although they're

1 not in court now on the issue of discovery. Plaintiffs'
2 theory seems to let us get by this by saying, "We can open up
3 broad discovery." Well, the Court made it clear that, because
4 of the enormous cost of discovery in these cases, that's not
5 allowable. Indeed, this Court needs to test the allegations
6 to make sure they're plausible with respect to the various
7 defendants before allowing that to happen.

8 Just briefly, Your Honor, on the question of
9 whether the case ought to be dismissed with prejudice. In Re:
10 Elevator, again, is instructive. And, again, there is at
11 that in In Re: Elevator. The plaintiffs here have had plenty
12 of time to perfect their allegations. In fact, this Court
13 invited them to fix their complaint at a previous hearing,
14 they declined.

15 And, in In Re: Elevator, the Court denied
16 leave to replead even in the case of an EC Statement of
17 Probable Wrongdoing because it concluded that the plaintiffs
18 second amended complaint contained as much specificity that it
19 has to muster. Plaintiffs have had the same complaints and we
20 respectfully suggest that Court, in the case Twombly and
21 In Re: Elevator and that ought to be dismissed with prejudice
22 and because they have had their chance and properly pleaded
23 their claims.

24 THE COURT: Okay. Thank you. Mr. Arenson?

25 MR. ARENSEN: Yes, it is, Your Honor.

Argument II - Mr. Arensen

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1 THE COURT: Okay. Do you have any bells and
2 whistles?

3 MR. ARENSEN: I am too old fashioned and I have no
4 bells and whistles and will try not to bother you as well.

5 THE COURT: I'm still reasonably fresh. By
6 1 o'clock or 2 o'clock it will be a different story.

7 Okay.

8 ARGUMENT II

9 BY MR. ARENSEN

10 MR. ARENSEN: I will introduce myself, at least to
11 the court reporter.

12 I am Greg Arenson of Kaplan, Fox and we
13 represent the plaintiffs here.

14 Let me start first with Twombly. The issue
15 there was plausibility. Plausibility of the claims asserted
16 there and here, Your Honor, my adversaries tried to
17 distinguish between the security, sorry, the surcharge and the
18 non-surcharge claims. They have conceded the plausibility of
19 the surcharge allegations.

20 If you take a look at their reply, Page 87,
21 they say quote, "They," referring to the plaintiffs, "set up a
22 straw man by arguing that the surcharge related allegations
23 are plausible.

24 " The Rule 8 opposition at 15 to 18. "At
25 issue, the defendants have not contested for the purposes of

1 this motion. "

2 So, Your Honor, we know that there is a portion
3 of the complaint that satisfies Twombly. Those --

4 THE COURT: I don't know if it satisfies Twombly, it
5 satisfies the notion of plausibility; and to some extent, it
6 would be impossible for the Court to ignore.

7 In the case of four defendants who have pleaded
8 or who have accepted responsibility, three pleaded guilty, one
9 acknowledged that there's not a plausible anti-trust claim, so,
10 you know, but I do -- I am troubled.

11 Frankly, I do find an awful lot of generalities
12 and not very much specificity about how this price fixing
13 occurred; and I'm also very troubled by the fact that we've
14 got 30 or however many defendants and as to at least all but
15 four of them, there's just nothing at all to indicate what --
16 how they participated in what they did and the suggestion that
17 there's really a number of different, you know, regions here a
18 number of different potential sub-conspiracies if you want to
19 call it that if there are conspiracies at all.

20 There's just not very much meat on these bones
21 and I'm very troubled by it particularly in light of what
22 Mr. Sherman said in, I guess, his penultimate point. Twombly
23 was ultimately focused on not unleashing broad, costly
24 discovery on the parties without more specificity and,
25 frankly, I don't find it here and I am troubled by the fact

1 that given that you had Lufthansa's cooperation now for a year
2 or more there's not more.

3 MR. ARENSEN: The complaint was filed, Your Honor,
4 back in February --

5 THE COURT: I understand.

6 MR. ARENSEN: -- of 2007 before we had much of
7 Lufthansa's cooperation and we need to take a look at what the
8 complaint said.

9 But if I might go back to Twombly for another
10 moment because there is another aspect that we think does bear
11 on what is troubling Your Honor.

12 THE COURT: Okay.

13 MR. ARENSEN: As I started out, I believe it's
14 basically a plausibility case; that, in the Sherman Anti trust
15 Case you got alleged facts that will give rise to
16 interpretation that the claim is plausible, and I still
17 suggest that defendants have conceded we've done that with
18 regard to the surcharges but I will put that to the side for
19 the moment, though, I want to come back to it.

20 There's also the aspect of notice and Twombly
21 made it clear, and it's stated at Page 1974. Quote, "We do
22 not require the heightened fact pleading of specifics."

23 And, in Footnote 14 on the previous page, 1973,
24 it says quote, "We do not apply any heightened pleading
25 standard, nor do we seek to broaden the scope of Federal Rules

1 of Civil Procedure §9. "

2 Clearly, the Supreme Court is telling us once I
3 suggest you get over the plausibility hurdle you don't have to
4 do as much in order to provide notice to the defendants,
5 because if you go to the beginning of the discussion by
6 Justice Souter as to what the standard is with regard to
7 pleading back on Page 1964 he said quote, "Federal Rule of
8 Civil Procedure §8(a)(2) requires only a short and plain
9 statement of the claim showing that the pleader is entitled to
10 relief in order to give the defendant fair notice of what the
11 claim is and the grounds upon which it rests. "

12 THE COURT: All right.

13 MR. ARENSEN: So, the purpose to give notice fair
14 notice is satisfied by a short and plain statement. It's not
15 all of these bells and whistles that Mr. Sherman is suggesting
16 we should have all of these opportunities to conspire in
17 Africa and Europe and wherever. We don't have to do that,
18 that's where the short and plain statement comes in that's
19 where Rule 8(a)(2) says we're not in Rule 9(b).

20 THE COURT: The plain statement has to say what a
21 specific defendants did. The fact that you can make a
22 plausible claim that four people here have conspired does not
23 mean that you have of a plausible claim that 33 others did.

24 MR. ARENSEN: Let's see what we say in the
25 complaint.

1 THE COURT: Okay.

2 MR. ARENSEN: I am going to go through some of the
3 paragraphs there and see how much detail we actually do
4 provide and how much notice we do provide to the defendants.

5 THE COURT: It's not notice, it's not notice.
6 That's not the issue.

7 I'm talking about plausible claims against the
8 plaintiffs, the defendants here who were not, who haven't
9 pleaded guilty to anything and who haven't accepted
10 responsibility.

11 I mean, it's just everybody is lumped together
12 here, that's one of my fundamental problems here. You take
13 from the fact that there's been some proof of a conspiracy, I
14 mean more than proof there is acceptance of responsibility of
15 a conspiracy and now you're asking the Court to now basically
16 involve the entire international air transport industry in an
17 antitrust case and I'm having trouble with that.

18 MR. ARENSEN: I don't think we're involving the
19 entire air transport industry first, Your Honor, we only have,
20 to give you a round number, 30 defendants. We haven't named
21 Turkish Airlines which might be involved; we didn't name Air
22 Malaysia which may be involved. So it isn't everybody, there
23 actually was some selection involved in this process.

24 THE COURT: And that's what needs to be in the
25 complaint. That's what needs to be in the complaint. What is

1 the selection mechanism?

2 MR. ARENSEN: When we say the defendants at the end
3 of 1999 jointly agreed on factors triggering the fuel
4 surcharge pricing system.

5 THE COURT: Where are you reading from?

6 MR. ARENSEN: I am more or less paraphrasing
7 Paragraph 87 of the complaint.

8 THE COURT: Okay.

9 MR. ARENSEN: Triggering the fuel surcharge pricing
10 system, the resulting price change to be implemented by the
11 occurrence of those factors and the timing of that change.

12 Well, all 30 defendants that we have named
13 participated in that. Do we have to list all 30 of the
14 defendants for participating in the changes to the surcharges
15 that were implemented actually were agreed upon at the end of
16 1999 for implementation.

17 THE COURT: Don't you have to give each defendant
18 notice of what they did?

19 MR. ARENSEN: We just did.

20 THE COURT: You're saying that each and every
21 defendant did the exact same thing?

22 MR. ARENSEN: Yes, that's right. And maybe they all
23 didn't get around in a room to do it, but with their contacts
24 around the world they were able to impose a fuel surcharge in
25 2002. Again, we're being -- the question is when we say when.

1 The defendant, this is Paragraph 90 of the
2 complaint, Your Honor, "The defendants jointly grieved and
3 initiated a four-step fuel surcharge increase program where
4 specific factors would trigger only one step per period and a
5 five cent which would increase at the fourth step. We allege
6 because we say defendants, each and every one of them, did it
7 and if each and every one of them did it, do we have to list
8 all 30 so they know what it is they did. Isn't this specific
9 enough?

10 Certainly, to give them notice, it's conceded
11 that it's plausible to say that they were involved in the fuel
12 surcharge program. And then, at the end of 2003 and beginning
13 of 2004, and that's in the next paragraph, Paragraph 91,
14 "Those factors trigger the fourth and final step of the
15 four-step program. Defendants then met to jointly agree on
16 additional steps to implement price increases in concert
17 beyond the original four-step program."

18 And, in Paragraph 92, we say they jointly
19 imposed additional multiple step price increases all at
20 identical amounts per step.

21 Eventually, Your Honor, we don't say this in
22 the complaint, they got up to the tenth step; they did it
23 several times. We do additional steps which were preceded by
24 multiple meetings, communications, and agreements. We do have
25 30 defendants here, do we have to list every single e-mail

1 that went back and forth between the defendants?

2 THE COURT: No, of course, not.

3 MR. ARENSEN: Right. So where do you draw the line?

4 THE COURT: I don't know.

5 MR. ARENSEN: Okay.

6 THE COURT: That's what I'm trying to figure out.

7 MR. ARENSEN: That's right.

8 What I suggest if you're supposed to give a
9 short and plain explanation under Rule 8(a)(2) do you have to
10 say more than there was this agreement in 2002, a four-step
11 program, five cents per step, than when they get to the end of
12 that. They go around they meet and they agree and they add
13 more steps on and that's what we did and that's what we
14 allege.

15 They not only did they do that, but we say they
16 involved other matters in Paragraph 88, if I can go back? We
17 generalize a little bit, but after all, we're trying to give
18 notice to the defendants of what they did. Defendants agreed
19 on the harmonization of the fuel surcharge, the implementation
20 of the fuel surcharge, the extension of the fuel surcharge
21 beyond the four steps.

22 Currency issues, Euros and dollars. Capping
23 the fuel surcharge by shipment or by weight. And refusing to
24 discount the fuel surcharge to freight forwarders.

25 And let me just focus a little bit on that last

1 one. Mr. Sherman said nowhere in that complaint do we tie the
2 discounts to the surcharges, right there in Paragraph 88 we
3 do.

4 So, how much detail do we have to give? Do we
5 have to name each of the 30 defendants who did participate in
6 the fuel surcharge overcharges. Do we have to say that Air
7 Korea did it? Do we have to say that Qantas did it? Do we
8 have to say that Cathay Pacific did it, or is it sufficient to
9 say that they did do it, all of them, because they did it do
10 because of the differences here between some of the cases that
11 the defendants have cited.

12 Here, all the defendants were in the same
13 situation and they all applied the surcharge. This is not
14 In Re: Elevator where all you've got is general statements.
15 We don't have these general statements of the 2002 four-step
16 program, 2003, what are we going to do? We're going to add it
17 on and continue on at the steps. That, I submit, is
18 sufficient specificity.

19 How about the security surcharge?
20 Paragraph 97, "Following the September 11th attacks,
21 defendants met and jointly agreed to impose a security
22 surcharge which remained in effect thereafter." So now they
23 know when. "Secret meetings and communications including
24 discussions at the highest levels of Re: Respective Companies
25 occurred in various venues Europe, United States, and Africa."

1 Well, do we have to say that there were meetings in Nairobi
2 and Johannesburg and Cairo? Isn't it sufficient to say that
3 there were meetings in Africa?

4 THE COURT: Why not.

5 MR. ARENSEN: Well, because if you're trying to
6 plead a complaint that's plausible and to give notice to the
7 other side do you have to plead that kind of evidentiary
8 detail? I would be --

9 THE COURT: I guess I'm asking why not give some
10 evidentiary detail. I'm saying you have to plead every fact.

11 MR. ARENSEN: But we just said --

12 THE COURT: I understand the argument.

13 MR. ARENSEN: I don't mean to cut you off, Your
14 Honor.

15 There has to be a line, I think you and I at
16 least agree on that. I assume that the defendant might agree
17 on that, but I think that would draw very close to let's go to
18 trial when you actually put all your proof in, that's what you
19 have to allege.

20 I still think, and the Supreme Court said it in
21 Twombly, that it is notice pleading regime. Yes, you have to
22 have more facts if you are pleading an anti trust case to show
23 that it's plausible. But beyond that, how much more do you
24 have to have in order to give notice to the defendants. Do
25 you have to say that they met in Tokyo? Do you have to say a

1 that they met at the Oak Bar over in Manhattan? Isn't it
2 sufficient to say they met in United States; they met in
3 Africa; they met in Europe. Where do you draw that line?

4 I suggest that we have sufficient facts so
5 they're not in any kind of questioning mind as to what it is
6 that they did. They know there was a security surcharge that
7 was imposed. They know that they had meetings at the highest
8 levels, do we have to list every single executive of the
9 companies that participated? Can we do that at the outset of
10 the case even if you are in a case where you don't have an
11 amnesty applicant? Is that really feasible to ask victims of
12 an anti-trust conspiracy to come in with that kind of detail?
13 You'll never get a case beyond a motion to dismiss, that can't
14 be right.

15 THE COURT: Well, what about Lufthansa's statement
16 that what they said, and I don't recall this, but I'm relying
17 on Mr. Sherman, that upon their cooperation it would exonerate
18 some of them.

19 MR. ARENSEN: I might disagree with that statement,
20 Your Honor.

21 THE COURT: Okay.

22 MR. ARENSEN: Based on our investigation maybe not
23 based just solely on what it is that Lufthansa knows.

24 THE COURT: Which suggests, then, that these
25 meetings were not great convocations of 37 people or 37

1 companies or how many, I didn't count, them but that there was
2 something a little bit less formal than that, right? That's
3 probably what happened, if it happened at all, and some more
4 evidentiary detail than just a global conspiracy that the
5 defendants meet and communicated and jointly agreed," those
6 are all sort of -- they are in the nature of conclusory,
7 conclusory assertions as opposed to the sort of.

8 MR. ARENSEN: Your Honor, we didn't just say they
9 met and they agreed.

10 THE COURT: No, you're right. You've given at
11 least, as to the surcharges, you've given some more detail of
12 what they agreed upon. It's a little bit less clear about how
13 they claim to do that, I'm assuming that they didn't, you
14 know, all gather in Nairobi at one time and sit down and so
15 that's part of what's troubling me.

16 MR. ARENSEN: Right. Do we say they met in Africa?
17 Do we say they met in the United States? We don't say that.
18 We don't say they met in the Oak Bar in Manhattan or they met
19 in Europe. We didn't say they met in Istanbul and Frankfurt
20 and Paris and Milan.

21 If we did say that, does it not provide them
22 any more notice? Is that any more of a factual pleading that
23 they have, that we have to, one, demonstrate a claim; and two,
24 let them know the scope of what it is they're going to be
25 investigating through discovery. I don't think the Supreme

1 Court was saying that in Twombly. I don't think the Second
2 Circuit was saying that in Northeastern or in Elevators.

3 THE COURT: Okay.

4 MR. ARENSEN: Okay. Let me go the through customs
5 surcharge. There's another example.

6 Since beginning in late 2003, this is our
7 Paragraph 104. Actually, let me start with 105. Since 2003,
8 air freight carriers have been required to prepare and submit
9 to U.S. Customs a manifest of all goods that the carrier will
10 offload in the United States. The manifest must be received
11 by the air freight carrier and then submitted electronically
12 to U.S. Customs by the air freight carrier before its airplane
13 enter United States airspace.

14 Since 2003, the defendants secretly met,
15 communicated, and jointly agreed to charge uniform, flat fees
16 to air freight customers for each defendants' preparation of
17 manifests in Paragraphs 106. The meetings and discussions
18 took place in Europe, Asia, America and elsewhere, not Africa.
19 So maybe it didn't happen in Nairobi.

20 Paragraph 4 of 106 defendants concertedly
21 agreed that they would charge €8 per manifest received from
22 air freight customer in manual paper, €2 per manifest received
23 in an electronic format.

24 So now again we did say defendants did that.
25 We know that the defendants who were shipping into the States

1 are charging the fees. It's in Euros, it's flat, doesn't seem
2 to bear any relation to whether it really has to go through
3 some manual processing or some electronic processing.

4 Are they not on notice of what it is that we
5 allege? Are they on notice of when it occurred? 2003, the
6 surcharges were implemented in 2004 I believe it says. The
7 next one, Paragraph 107, implemented by the defendants
8 beginning in August, 2004 and continued thereafter.

9 THE COURT: Take just a couple minutes on the
10 non-surcharge allegation if you would.

11 MR. ARENSEN: I would be happy to.

12 THE COURT: Those are much less detailed, they don't
13 really provide any detail about, well, I guess the refusing to
14 discount, it says they refused to discount.

15 MR. ARENSEN: Right.

16 THE COURT: Not with respect to surcharges I mean
17 which is --

18 MR. ARENSEN: Remember the defendants have conceded
19 that on the surcharges it's plausible.

20 THE COURT: Right.

21 MR. ARENSEN: The discounts, Paragraph 88, it's
22 right in there and it links down obviously later on to where
23 we take them out separately.

24 Let's look at Paragraph 89, Your Honor.

25 THE COURT: I saw that the converted increases in

1 years and the allocation of customers, there's not much detail
2 at all about what was even accomplished by that. I mean,
3 concerted ly agreed to concerted ly increase their yield. I
4 don't even know what that means. I mean, I guess it --

5 MR. ARENSEN: I think the defendants do know what it
6 means, Your Honor.

7 THE COURT: Okay.

8 MR. ARENSEN: And the pleading --

9 THE COURT: Help me.

10 MR. ARENSEN: I'll try, I will step outside the
11 complaint and explain if you want, but I think it's implied in
12 the complaint. But what yields rely revenue per ton mile.

13 THE COURT: I'm sorry.

14 MR. ARENSEN: Yields are revenue per ton mile.

15 THE COURT: How they jointly agreed increasing
16 yields.

17 MR. ARENSEN: The complaint alleges that the data is
18 available to all air freight carriers for the industry as a
19 whole, that's Paragraph 111. And they, through IATA, they
20 don't say IATA, but that's what it is; that's the trade
21 association. And in furtherance of their agreement, we allege
22 that the defendants privately exchange an individual air
23 freight carrier's yields, that's in Paragraph 112.

24 So now they know each others' yields, revenue
25 per ton mile, and they can agree that we'll raise the revenue

1 per ton mile on your routes into the United States starting
2 now by five percent. How can you do that? There are a
3 variety of ways doing that: You can raise the rates, raise
4 the fuel surcharges, whatever it is.

5 THE COURT: Then why isn't that pleaded?

6 MR. ARENSEN: Because.

7 THE COURT: I mean, if that's sort of, like, a means
8 and methods of this conspiracy, that would give some meat to
9 the generalized allegations to these conclusory allegations to
10 concerted increase their yields, I didn't understand what
11 this meant. And now I understand what that means, it's still
12 generalized. It still doesn't tell me what they did,
13 accomplish that purpose.

14 MR. ARENSEN: Let's hypothesize the following
15 agreement that two airlines, we'll keep it simple rather than
16 30, although I believe that 30 may have been involved.

17 The two airlines say, "Let's increase our
18 yields on shipments from Europe to New York by five percent."
19 The implementation is up to your local people on the ground,
20 we don't care about that, but the point is you and me are
21 going to charge our customers by five percent more so that the
22 yields go up.

23 THE COURT: But why don't you plead then if that's
24 what they did.

25 MR. ARENSEN: I would suggest that is what we pled,

1 because if you take a look at Paragraph 113 call it January 1,
2 2000, to February 8, 2007, which is the date of the filing in
3 Brooklyn, the defendants met discussed and jointly agreed to
4 concertedly increase their yields on air freight shipment
5 services.

6 It didn't say they this five percent in 2004
7 and they did it three percent in 2005 or whatever. I agree
8 that it doesn't have that kind of detail, but do we need to
9 have that kind of detail to put them on notice as to what was
10 going on with the yields.

11 They understand what yields are, we understand
12 what yield are, Your Honor now understands what yields are,
13 and if the agreement is let's have it go up five percent, then
14 that's what we are saying.

15 THE COURT: The same problem with the increase --
16 the allocation of customers.

17 MR. ARENSEN: Paragraph 114 on that one, Your Honor.

18 THE COURT: Yes.

19 MR. ARENSEN: Because what it says is, "During the
20 time from January 1, 2000, through February 8, 2007," which is
21 the date for the complaint, "defendants met communicated and
22 jointly agreed to increase maintain or stabilize air freight
23 shipping services prices by allocating their customers where
24 necessary in order to minimize a customer's ability to access
25 competitive rates."

1 So we're only talking about a certain aspect of
2 customer allocation. It's not that the defendants sat down in
3 a room and said, "This particular freight forwarder," Aim,
4 which is one the plaintiffs, "will be Lufthansa's freight
5 forwarder," and the rest of us Korean Air, Air France will not
6 be doing that.

7 We are saying that where there was a problem
8 then perhaps the air freight customer had enough business that
9 could effect the competitive rates could get a negotiation
10 going. The defendants agreed in that situation that they were
11 going to minimize the customer's ability to access competitive
12 rates.

13 THE COURT: Why isn't that pleaded with a little bit
14 more specificity as to how this was done? I mean this is --
15 these are very generalized. I think I know the answer, the
16 answer is going to be, "Well, how much do we have to do?"

17 MR. ARENSEN: Let me just say this. If, in fact,
18 you suggest that we haven't pled it with enough specificity,
19 contrary to what Mr. Sherman said, I think we should be given
20 an opportunity to put those facts into an amended complaint.

21 THE COURT: Okay. Thank you, Mr. Arenson. Let me
22 give Mr. Sherman a brief chance to respond.

23 I am primarily concerned with the surcharge
24 allegations and I will go back to asking the question I asked
25 you at the outset since Mr. Arenson now sees that increased

1 when they say, "defendants," they mean the defendants met and
2 agreed. They did all meet in one place, they met and agreed.
3 Indeed, they mean that every single one of the defendants were
4 an involved in this.

5 Well how much more detail is required with
6 respect to the surcharges, since there's a fair amount of
7 detail as to the amounts of surcharges when they came into
8 being roughly, and so how much more do they have to plead for
9 that?

10 MR. SHERMAN: Well, Your Honor, first let me say it
11 is interesting because Mr. Arenson, in describing what they
12 allegedly pleaded, added facts to virtually everything he
13 described. He purported to read to you Paragraphs 113 and
14 114, but he didn't read the paragraphs, he added a timeframe.

15 THE COURT: That's not the surcharges.
16 Paragraphs 113 and 114 have to do with a non-surcharge
17 allegation, that's what I'm asking about here.

18 MR. SHERMAN: Fair enough, Your Honor.

19 With regard to the surcharges, again, their own
20 complaint belies the allegation that all defendants were
21 involved. They say it in places it was applied unevenly. If
22 it is indeed their allegation that all defendants met in
23 Africa on a particular date, then it ought to be in the
24 complaint. All defendants met in Africa on this date to
25 discuss X.

1 THE COURT: So, you would say they do have to
2 describe with some specificity the meetings that occurred.

3 ARGUMENT II

4 MR. SHERMAN

5 MR. SHERMAN: With some specificity, yes, Your
6 Honor. There needs to be some factual matter and it --

7 THE COURT: Where is that? Let me ask you what
8 authority is there for that?

9 MR. SHERMAN: Again, I think it's directly out of
10 Twombly and out of In Re: Elevator and it sounded to me like
11 Mr. Arenson was reading from In Re: Elevator.

12 In going through the paragraphs in describing
13 what they allege, it's extremely similar to the allegations in
14 In Re: Elevator. And, again, it's not simply is it
15 plausible, is it alleged as to all the defendants here, and
16 that's exactly what the Second Circuit hit on in saying the
17 list is entirely, entirely in general terms without any
18 specification of particular activities by any particular
19 defendant.

20 Now, why is it you raise a number of times with
21 Mr. Arenson why isn't it pleaded in there? Well, he said, We
22 shouldn't have to well why it is given the amount of time
23 given the fact that they have had access to Lufthansa's
24 materials. Why is it that plaintiffs haven't amended their
25 complaint, haven't sought to amend their complaint to add the

1 sort of details and Mr. Arenson just stood here and told you.

2 Well, Your Honor, I suggest that the reason is
3 because if they added the specifics and pleaded with the
4 specificity required by Twombly in the Second Circuit it would
5 show that indeed all defendants did not meet in Nairobi or
6 wherever any particular time; that, in fact, they don't have a
7 basis for alleging a worldwide conspiracy with respect to
8 surcharges or anything else.

9 That's exactly why the Supreme Court and the
10 Second Circuit require factual matter and not just a
11 generalities. Defendants are no longer required to respond to
12 generalities, and indeed, I respectfully disagree with
13 Mr. Arenson. It's true that the Supreme Court did not do away
14 with the notice pleading of §8(a) but to suggest that Twombly
15 effected in change in the pleading requirements.

16 I understand that plaintiffs want to believe
17 that, but it's simply not the case in retiring the Connolly v.
18 Gibson "No Set of Facts" language, the Supreme Court made it
19 pretty clear that what plaintiffs have been doing for years is
20 what plaintiffs attempt to do here: Make general allegations
21 and say, well, you could conceive of a set of facts. We
22 couldn't prove which would tie this up and it is no longer any
23 good under the Supreme Court. You got to show your cards now
24 or you got to fold, and plaintiffs haven't done it here and
25 it's clear they haven't done it just by what Mr. Arenson told

1 you.

2 THE COURT: Okay.

3 MR. SHERMAN: Unless you have other questions.

4 THE COURT: No, I think you answered the question.

5 Let's move to the preemption.

6 I am going to shift the order of argument
7 because, frankly, the decision by the Supreme Court recently,
8 and I guess it was a more recent Second Circuit case, poses a
9 substantial hurdle. It seems to me for the argument, that for
10 one branch of the ADA Preemption argument that the plaintiffs
11 have made and I'm not terribly persuaded by the distinction
12 drawn between foreign carriers and air carriers; and I think
13 it's best if I left why they're preempted first with the frank
14 pronouncement acknowledged by the Court that the Court is
15 really troubled by. I think the defendants have a pretty
16 strong argument here. So, is it Mr. Lovell?

17 ARGUMENT III

18 BY MR. LOVELL

19 MR. LOVELL: Yes, Your Honor. We do have a slide
20 presentation. I would like to get right at this foreign air
21 carrier/air carrier issue. I think that's the new ground for
22 Your Honor in this case.

23 In 1938, Congress enacted the Federal Aviation
24 Act. It has a slightly different title which we'll get it up
25 in a second in 1938. From 1938 forward, Your Honor, Congress

1 defined foreign air carrier and air carrier mutually
2 exclusively. Foreign air carriers have to be from somewhere
3 else; air carriers have to be from the United States. Foreign
4 air carriers cannot do domestic flights. Air carriers,
5 depending on their certificate or exemption can. That was
6 carried forward for 40 years with no preemption provision, no
7 express preemption provision in the statute.

8 In 1978, Congress enacted the ADA.

9 Can you get slide three up there?

10 Let me keep going, Judge. If we ever get it up
11 we'll discuss it. I think we can lay it, it's clear to me
12 anyway.

13 In 1978 --

14 THE COURT: I'm listening, but I don't want you to
15 feel distracted. I'm perfectly willing to wait for a second
16 if you're close.

17 MR. LOVELL: In 1978, The Airline Deregulation Act
18 was enacted. It carried forward the same statutory
19 distinctions between air carrier and foreign air carrier, two
20 entirely different terms and two entirely different functions,
21 so they're different persons with different functions.

22 Next slide.

23 Now, in the Airline Deregulation Act, Your
24 Honor, Congress deregulated domestic airlines. It did not
25 deregulate foreign airlines, only the domestic airline

1 industry was deregulated.

2 Go to the next slide.

3 Now, in the ADA, for the first time, Congress
4 inserted a preemption provision into the federal aviation
5 legislation, and as the Supreme Court has said, and as
6 Congress said, the purpose of the preemption provision was to
7 protect the deregulation of domestic aviation from regulation
8 by the states and those are our cites.

9 Go to the next one.

10 So, we come to the language of the provision at
11 issue. The provision was enacted in the ADA in '78; there's a
12 one word amendment. In '84, and defendants said there was no
13 change by the '94 amendment, so we're looking with the
14 exception of one word which we'll come to that way and Your
15 Honor has to decide.

16 "...no state...shall enact, enforce any law,"
17 et cetera, "of any air carrier having authority under
18 subchapter IV of this chapter to provide interstate air
19 transportation."

20 Each of these terms is a defined term. First
21 of all, an air carrier -- if you go back to slide two -- air
22 carrier has never been a shorthand term in the statutory law
23 of the Federal Government for air carrier and foreign air
24 carrier. Air carrier has always been used in every provision
25 except for one or two exceptions where it couldn't mean just

1 air carrier as air carriers are domestic entities.

2 Likewise, when Congress wants to include both
3 air carrier and foreign air carrier with the benefits or
4 burdens of a provision, Congress invariably uses both terms.

5 Okay let's go back.

6 Next one.

7 Next one.

8 Now, in this Circuit, there is a binding
9 decision on the U.S. v. Keuylian on what the Federal Aviation Act
10 is doing when it uses "air carrier" and "foreign air carrier."
11 U.S. v. Keuylian says they are mutually exclusive terms. This
12 mutual exclusivity are upset in subsequent Second Circuit
13 cases or any subsequent court in the Second Circuit.

14 On the contrary, the foreign air carriers --
15 this is the third bullet up there -- have used the
16 distinctions over and over to get the benefit of complying
17 with the figures in the FAA that says this applies to an air
18 carrier and there is no case that goes against it in this
19 circuit.

20 I would say Your Honor is almost bound when you
21 see the words "air carrier" in the FAA. It means air carriers
22 and it does not include foreign air carriers going back to the
23 preemption provision.

24 Back the other way.

25 So, Judge, if Congress wanted to include

1 foreign air carriers who couldn't provide the benefits of
2 deregulation as they couldn't operate domestically, but if
3 Congress wanted to put them into the express preemption they
4 would have said, as they say in all the other sections, air
5 carrier and foreign air carrier; Congress didn't do that.

6 Now, in air carrier, an air carrier is not
7 someone who has received a certificate or an exemption. An
8 air carrier is anybody who is acting. So, if you haven't
9 received a certificate or an exemption you're still an air
10 carrier. If you're flying and all of these are
11 prosecutions -- they're in our first brief, Your Honor.

12 THE COURT: Yes.

13 MR. LOVELL: Of people who were air carriers but
14 they hadn't been authorized yet.

15 Now they do not get the benefit of preemption?

16 Let's go to the next slide.

17 By the original language, we looked at the
18 language under subchapter IV. You don't have preemption
19 benefits until you have from the federal government either a
20 certificate or an exemption.

21 Now, this Hughes case had to confront the
22 following question. Is an exemption good enough to qualify
23 for preemption? Do you need to get a certificate; and they
24 said "having authority to" means both either a certificate or
25 an exemption.

1 Let's go to the next one.

2 The Civil Aeronautics Board in 1979 came up
3 with the "Walter Alston Rule." It was a final rule, but it
4 was called an interim policy and what it was an interpretation
5 of this preemption provision and some other things.

6 As we said in each of the bullets here, Judge,
7 the Civil Aeronautics Board's binding interpretation of the
8 preemption provision is that either an exemption or a
9 certificate will entitle you to preemption but not until you
10 obtain it.

11 So, if we go back to the original language,
12 preemption is limited to air carriers; and moreover, it's
13 limited to air carriers who have actually gotten the
14 certificate or got the exemption.

15 And, so, this -- it's in the last bullet --
16 this 1979 interpretation completely agrees with plaintiffs'
17 interpretation in the statute. We did not put in cases on
18 deference which Your Honor is probably familiar with now.

19 Let's go to the next one.

20 Now, the third clause that was up there
21 originally in the statute is interstate air transportation.
22 It's an air carrier having authority to conduct interstate air
23 transportation. That's the first bullet; this is the
24 congressional definition. It's between states or territories,
25 overseas transportation. The second definition is another

1 part of domestic air transportation, but it involves
2 territories or possessions the way it says, Your Honor.

3 THE COURT: Mm-hmm.

4 MR. LOVELL: So, a foreign air carrier is not an air
5 carrier. But also a foreign air carrier can't provide
6 interstate air transportation. A foreign air carrier can only
7 get a permit for foreign -- the third bullet -- for foreign
8 air transportation.

9 So, Congress has excluded foreign air carriers
10 from the preemption, from the expressed preemption provision
11 in this case.

12 Okay, let's go to the next one.

13 The summary of the 1978 preemption provision is
14 limited only to air carriers who have received their
15 certificate or been exempt to provide interstate air
16 transportation. Deregulation was extended to overseas air
17 transportation but preemption did not. Preemption was not
18 given to those air carriers who had a certificate to engage in
19 overseas air transportation in the '78 statute.

20 Okay, let's go to the next one.

21 Let's skip that, let's come back to the next
22 one.

23 Now we go to the next statute.

24 In 1984, The Civil Aeronautics Board Sunset Act
25 of 1984. The CAB is going out of business, they did a good

1 job, they got things deregulated, and was renamed the
2 Department of Transportation. The Department of
3 Transportation is going to take over and is going to run the
4 airways and other things, too.

5 In '84 they have the legislative history. This
6 legislative history confirms what was said by Congress in '78
7 and the Supreme Court decision on deregulation was centered
8 only included, not centered on, only included domestic
9 aviation.

10 The second bullet.

11 Hearings for the '84 act have led the committee
12 to conclude that deregulation has generally been successful
13 and that there should be no change in the major reform of the
14 ADA, the deregulation of domestic air carrier routes and
15 rates. It says before they were phased in at different times.

16 And the third bullet.

17 This act clarifies and completes the program
18 established in with this [8] for the deregulation of domestic
19 aviation.

20 I'm sorry for repeating myself, Your Honor.

21 The foreign air carriers couldn't do domestic
22 aviation. They couldn't do anything that this act was
23 clarifying and completing.

24 Let's go.

25 In 1984, there was a one-word amendment to the

1 preemption provision. The word "interstate" in this third
2 clause where we put the bracket in, the third bracket up
3 there, was deleted. So, now it says, "Any air carrier having
4 authority under subchapter IV of this chapter to provide air
5 transportation no longer is it limited to interstate."

6 Let's go to the next one.

7 The legislative history shows no intent to
8 include foreign air carriers within preemption. First of all,
9 they still can't do domestic. Second of all, the House bill
10 states, this is the very scant legislative history, and I
11 would say it's not as clear as it could be, but a lot of times
12 that's the way it is with Congress.

13 Things are not as clear as it could be and
14 that's a big part of what you do, Your Honor, and there's a
15 gap between what was intended in the language a little bit, or
16 it's not totally a map, and here they have it in Section 9 of
17 the House bill makes an amendment to conform the regulatory
18 format in the FAA to interstate and overseas cargo with the
19 regulatory format, et cetera.

20 Next bullet.

21 Deletion of "interstate" was necessary to all
22 carriers having authority in the air carriers having authority
23 to provide interstate were entitled to preemption. This
24 picked up the air carriers who did overseas air cargo and also
25 it subjected anybody in the domestic airline industry to the

1 rigors of competition and it gave them the benefit of
2 preemption.

3 The 1994 amendments. This is the last
4 amendment that has been made, this statute hasn't been amended
5 since then. The 1994 amendment to the preemption provision,
6 defendants assert, has no substantive change. The amendment
7 was made to read as follows and they took out "having
8 authority" to "may provide" in what we say in our brief in a
9 different section of the FAA, "may provide" has been
10 interpreted to mean "having authority."

11 So, the defendants are in essence right, and
12 through all of these statutory changes, the Congress has
13 carried forward the mutual exclusivity of air carriers and
14 foreign air carriers? The definition and the mutual
15 exclusivity are in the function. So, still, if you're going
16 to provide the domestic aviation education benefits of
17 deregulation, you have to be an air carrier and you have to be
18 one with authority that may provide transportation under this
19 subpart.

20 Okay, go to the next one.

21 Now, we say, Your Honor, that there's only one
22 way this statute can be read and that applies to a preemption;
23 express preemption applies to a subset of air carriers. We
24 don't have the burden to show that it can only be read that
25 way. If the preemption standards mean anything, strong

1 preemption, strong presumption against preemption.

2 THE COURT: Didn't the Supreme Court say exactly the
3 opposite here? The Supreme Court just basically said, no,
4 whatever may apply to other preemption arguments. The ADA
5 Preemption was meant to be read broadly --

6 MR. LOVELL: Yes, I agree with Your Honor that the
7 phrase, there's two different issues. There's the
8 jurisprudential issue, but that's probably the adjective for
9 what happens with Your Honor is confronted with in a motion or
10 what standards you use and then what does the language mean.

11 Yes, the Supreme Court says the language is
12 broad, you have to look at the words. Second, when you then
13 look at the words this standard has not been thrown out.

14 The defendants' statement that it's a broad
15 statute is correct. However, in this Circuit under
16 Abdu-Brisson and other cases you look at, you look at under
17 the same Supreme Court said, "The strong presumption under
18 preemption."

19 THE COURT: I'm just not gathering the distinction
20 you're making. On one hand, the Supreme Court has said,
21 "broadly." Now, you say you read it broadly and you read it
22 narrowly. I don't know how I can harmonize those two
23 concepts.

24 MR. LOVELL: I agree. I'm not saying it very well,
25 but I think the distinction is this for any statute Your Honor

1 is confronted with there is a strong presumption against
2 preemption. The burden is on the movant in express preemption
3 provisions are narrowly construed all of that jurisprudential
4 law applies.

5 As far as the judicial tests all apply. But
6 the Supreme Court has told you this is a broad provision,
7 okay? I'm going to still put it through the same judicial
8 hopper but I know when it's going in it's a broad provision.

9 THE COURT: Okay.

10 MR. LOVELL: I hope that's good.

11 THE COURT: I better understand the argument let me
12 put it that way.

13 MR. LOVELL: Thank you, Your Honor.

14 Next slide.

15 Now, this was not changed by the recent
16 decisions we say, Your Honor, and we say in this Circuit it
17 remains good law. The defendants, from their opening brief,
18 have argued it. Abdu-Brisson held at the motion to dismiss
19 stage Delta could not overcome its initial presumption of
20 preemption by establishing that the purpose of the state law
21 could be frustrated. In the recent Supreme Court case, it
22 says at least this has to be shown. It does not say that
23 something more has to be shown.

24 Let's go to the next one, all right.

25 So here's the plaintiffs' versus defendants'

1 interpretation. This is all addressed to foreign air carrier,
2 air carrier.

3 The first bullet on the left is our view that
4 is does not change the use and meaning of virtually the same
5 language when the provision was amended in '84. I think even
6 the defendants will concede if Your Honor will ask them when
7 they stand up that the '78 statute was limited to air carriers
8 and that there is no way that they could have been included in
9 that. They will concede that, I believe.

10 Now, the burden is on them to say in '84 when
11 one word is taken out that Congress intended through that one
12 word to explode this preemption provision that has been
13 limited to domestic aviation and make it worldwide and bring
14 in all foreign air carriers when all the legislative history
15 shows you have the opposite.

16 In the selected bullet we agree with the CAB
17 policy --

18 THE COURT: What was the reason? You're talking
19 about the elimination of the word "interstate."

20 MR. LOVELL: I can tell you one reason for sure, and
21 I think it's of a sufficient reason, because overseas people
22 were overseas air cargo, the definitions that we went through.

23 THE COURT: Foreign? There was three classes of
24 transportation: Interstate --

25 MR. LOVELL: We'll get to the definitions. Here it

1 is, Your Honor.

2 THE COURT: Yes.

3 MR. LOVELL: Interstate.

4 THE COURT: So there's four definitions. If we're
5 going to go by definitions, it's the last definition that now
6 would apply, right? They took out interstate and made it
7 applicable to all air transportation.

8 MR. LOVELL: Yes, Your Honor, they didn't change the
9 words "air carrier."

10 THE COURT: No. I mean, that's the tricky part. I
11 don't disagree.

12 MR. LOVELL: Okay; all right.

13 If you're coming from where I'm coming from,
14 the Second Circuit law and the statutory definitions and
15 everything, air carrier means air carrier.

16 Get the other sections of law up there where
17 they -- where Congress uses both air carrier and foreign air
18 carrier.

19 If you turn to the '84 amendment, Your Honor,
20 they had created a preemption provision that didn't do what
21 they said they were doing. Congress said, "We are going to
22 protect from regulation that which we've deregulated." It
23 does not protect deregulation over air carriers who had
24 overseas transport, they took that out; and in doing that,
25 they then protected all air carriers.

1 Now, our brief is alcoholic full of these other
2 provisions.

3 THE COURT: I didn't follow what you just said. But
4 one thing that it seems to me is a canon of statutory
5 construction is that you look at the language of the statute
6 and that legislative intent informs that only when the
7 language of the statute is not clear and unambiguous.

8 MR. LOVELL: Plaintiff totally agrees.

9 THE COURT: It seems that most of your argument is
10 fixed on legislative intent when legislative intent is not
11 where I should be focusing my and, in fact, I would suggest
12 that the current Supreme Court has even furthered, sort of
13 derided the reliance on the legislative intent.

14 MR. LOVELL: I agree with Your Honor on that, too,
15 and Justice Stevens is a great proponent of mock preemption
16 would not go along with Justice Ginsburg in the recent trilogy
17 and said she's right on the legislative history, Congress
18 didn't intend that, but we have too many authorities.

19 There is a hierarchy if you look at the words
20 first. If the words are clear and consistent if anything is
21 clear, if the legislative history, the structure of the
22 statute, in fact, the structure may be part of -- I think is
23 part of the way Lexicon and some other cases go to look at the
24 words does not mean, "Just look at the words of the section
25 that you are interpreting," you also have to look at the whole

1 statute: The definition, how the terms are used in other
2 parts of the statute that is looking at the statutory words
3 albeit where you go first. You don't go beyond that if the
4 words are clear, let's go back to the preemption.

5 THE COURT: Your argument really focuses on whether
6 air carrier means something more than that original definition
7 of air carrier.

8 MR. LOVELL: And our argument is that it can. Go
9 back to the only preemption. I think it's seven.

10 Here it is, Your Honor. We think it's over of
11 the -- given that for 40 years before and 30 years since air
12 carrier and foreign air carrier are mutually exclusive in the
13 Keuylian case says that and the Second Circuit says they're
14 mutually exclusive. It would not mean anything if you look at
15 the language and look at the air word "carrier."

16 The shorthand for air carrier and foreign air
17 carrier never, in all of the sections of the law, if they mean
18 foreign air carrier they bring it in. There's one section
19 that says, "Air carrier holding a permit."

20 Now, you have Hobson's Choice, I don't know who
21 Hobson was. A permit can only go to a foreign air carrier and
22 so statutorily defined as air carrier and you have a permit
23 and that's the one section that the defendants cite in their
24 brief and they're right.

25 There, you know, they have this principle and

1 we totally agree with you the word is superfluous and they're
2 going to add a superfluous word. Even if carrier is defined,
3 if the statute is going to be off or a permit is going to be
4 off.

5 So, the only way it can be there -- or not off
6 -- the matter of reading is Congress slipped, as it slips from
7 time to time, in the cases we see when it left out overseas in
8 the language. But when you look at this language, here it
9 couldn't be clearer; air carrier just means air carriers.

10 Now, if you want to read the other clauses they
11 further tie it down to air carrier, interstate air
12 transportation. Now --

13 If you go to '84, to the current statute, all
14 that they did is take out the word "interstate," Your Honor,
15 so it's any air carrier having authority you have to get the
16 exemption or certificate for air transportation which brings
17 in the overseas. It breaks in the whole U.S. air carrier
18 airline industry who Congress wants to be subject to the
19 benefits of competition. The plain language of the statute
20 couldn't, I submit, Your Honor, I know I'm -- it couldn't get
21 any clearer. Air carrier.

22 Now, what are we going to do, explode air
23 carrier and say this one time they meant shorthand, no way.

24 THE COURT: Okay. I understand the argument. Okay,
25 let me let the defendants respond or the movants respond.

1 Mr. Sherman again.

2 ARGUMENT III

3 BY MR. SHERMAN

4 MR. SHERMAN: Sorry, Your Honor.

5 THE COURT: You have whistles and bells this time?

6 MR. SHERMAN: Still no whistles and bells.

7 Your Honor, I must confess that I was trying to
8 keep up with Mr. Lovell. I had a problem.

9 THE COURT: Here's -- he says that the Federal
10 Aviation Act of which the ADA is part of it as I understand.

11 MR. SHERMAN: Yes.

12 THE COURT: It defines foreign air carriers and air
13 carriers separately.

14 MR. SHERMAN: I am prepared to address that.

15 THE COURT: That's my most fundamental question.

16 MR. SHERMAN: I understand that and there are a
17 couple of problems with the indirect plaintiffs' argument on
18 that. The first problem is that no Court has ever accepted
19 that their interpretation.

20 THE COURT: Only one court really addressed, as I
21 recall, was that the Lawal court and the Supreme Court sort of
22 wasn't asked but addressed it but didn't it's -- if it didn't
23 apply --

24 MR. SHERMAN: It was specifically raised in the
25 Supreme Court in the Morales case.

Argument III - Mr. Sherman

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1 THE COURT: But not decided.

2 MR. SHERMAN: Well, in finding preemption as to all
3 airlines there --

4 THE COURT: Okay.

5 MR. SHERMAN: -- the Supreme Court certainly decided
6 it, decided sub silentio, but there was no question that it
7 was raised in the Supreme Court. There was a jurisdictional
8 question that can't be waived and, therefore, the Court's
9 decision has to have rejected the argument with respect to the
10 foreign carrier.

11 Admittedly, in the opinion they don't address
12 it, but they could not have come to the decision that they
13 came to if you accept the plaintiffs' reading.

14 Now Lawal court in the same year, 1992,
15 expressly addressed the argument that they made and rejected
16 it. And rejected it for the very reason that Your Honor
17 brought up which is that the Court found that the language of
18 the statute is unambiguous and no need to go to the
19 legislative history when the statute is unambiguous.

20 THE COURT: Why did they not go to definitions in
21 the statute, that's what I'm --

22 MR. SHERMAN: Your Honor, the problem with the
23 plaintiffs' argument that what they want you to do is to stop
24 reading at words "air carrier." That's not what the
25 preemption statute says. The preemption statute says --

1 THE COURT: I know, but I understand the argument
2 that follows from there. You're saying it's air carrier has
3 further defined --

4 MR. SHERMAN: Exactly. Exactly.

5 It's air carrier, a state as a political
6 subdivision of a state may not enact or enforce a law or
7 regulation or provision related to a price route or service of
8 an air carrier that may provide air transportation under this
9 subpart.

10 Now, if they had stopped at air carrier, we
11 might have a different case, but the words "that may provide
12 air transportation under this subpart," well, we need to look
13 at that. It's subpart II that they refer to. Subpart II
14 governs economic regulation of both U.S. and foreign air
15 carriers.

16 The subpart includes Section 41302 which
17 authorizes DOT to grant permits to foreign air carriers. The
18 term "air transportation" clearly includes foreign air
19 transportation and foreign air carriers. So, you can't stop
20 with the word air carrier, you read the term in the context of
21 the statute.

22 Mr. Lovell admitted he said, well, once or
23 twice they actually used the term "air carrier" and it doesn't
24 mean just domestic. Well, that's right, and they do that in
25 other circumstances where the context of the language

1 application to clear that, it can't be simply a domestic
2 carrier. 49 U.S.C. 44901(h)(1) talks about an air carrier
3 providing air transportation under a certificate issued under
4 Section 411102 which is a U.S. carrier or a permit issued
5 under Section 41302 which is a foreign air carrier.

6 THE COURT: Wait, back up on that. I wasn't
7 following that entirely.

8 MR. SHERMAN: This is section 49 U.S.C.
9 Section 44901.

10 THE COURT: Subpart IV.

11 MR. SHERMAN: This is the section that Mr. Lovell
12 was referring to when Congress has included the words "air
13 carrier" but then distinguished and included both carriers who
14 get certificates that U.S. carriers and carriers who get
15 permits which is foreign carriers. So, clearly, there is at
16 least one other instance where looking at the contention you
17 realize that what it means here.

18 THE COURT: Okay.

19 MR. SHERMAN: There's also the case which we cited
20 to you of South African Airways v. Dole which is an '87 case
21 by the D.C. circuit. There is a case where the Anti-Apartheid
22 Act directed revocation of the right of any air carrier
23 designated by the Government of South Africa and a case was
24 brought when the rights were revoked and the airline came in
25 and said, "Well, wait a minute, any carrier designated by the

1 government of South Africa has to mean a U.S. carrier," and
2 the D.C. Circuit said it's ridiculous.

3 Obviously, Congress didn't mean to allow the
4 government of South Africa to designate a U.S. air carrier.
5 You have to look at the context to discover what the words
6 actually mean.

7 Now, as I said, Lawal is the only case that
8 specifically addresses plaintiffs' contentions and rejects
9 them because Lawal did just that. Lawal looked at the full
10 language of the paragraph. The Court in Lawal said -- if you
11 look at the full language -- it's unambiguous. So, you got
12 Lawal, you got Morales which is a Supreme Court case, and then
13 you got a number of decisions over the years which have
14 applied preemption to foreign carriers even if not expressly
15 going through the analysis that the Lawal court went through.
16 But, to be clear, if this court accepted plaintiffs' argument
17 and didn't apply preemption to foreign carriers, you would be
18 the first court ever to do that. And verify that the
19 preemption provisions do not apply to foreign carriers and the
20 Court started by asking Mr. Lovell about recent cases. The
21 recent Rowe case and the recent Cuomo decision in the Second
22 Circuit. Mr. Lovell didn't address it but I would like to
23 address it.

24 THE COURT: That goes to a different part of the
25 argument.

1 MR. SHERMAN: The Cuomo decision didn't. The point
2 Mr. Lovell made in that they both confirmed that whatever he
3 says about the general presumption about preemption, it's
4 clear that the Supreme Court has said this ADA Preemption is
5 to be construed broadly. Rowe confirmed that the Cuomo case
6 followed that and reemphasized that but the Cuomo case this
7 was The Passenger Bill of Rights which I'm sure the Court is
8 aware of. The Passenger Bill of Rights Act was passed because
9 of the stories about people being stuck on planes for hours on
10 the tarmac and in deciding that the act was preempted clearly.

11 The Act applied to foreign airlines as well as
12 domestic airlines. The Second Circuit didn't say, "Well, wait
13 a minute. We're only going to apply this to domestic
14 airlines." The Second Circuit, again, a case not expressly
15 addressing it but another case where, in overturning the
16 statute because it's preempted the Court, included foreign
17 carriers within the decision.

18 (Continued on the next page.)
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23
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25

1 ARGUMENT III (continued)

2 BY MR. SHERMAN:

3 MR. SHERMAN: Just to go briefly to a couple of
4 points that Mr. Lovell made.

5 His claim that Abdu-Brisson says in the Second
6 Circuit that the statute must frustrate of purpose of the ADA,
7 this is another thing that Rowe speaks directly to. This is a
8 recent Supreme Court decision. And it doesn't say the
9 qualified language, as suggested by Mr. Lovell. It says this:
10 "In respect to preemption" -- this is a quote. "In respect to
11 preemption, it makes no difference whether a state law is
12 consistent or inconsistent with the Federal regulation."

13 Mr. Lovell spent a lot of time sort of bouncing
14 around the legislative history. I do want to correct one
15 thing that he says of our argument. We don't say that neither
16 the 1984 nor the 1994 statute, change in the statute affected
17 any substantive difference. We say that only about 1994. And
18 we don't say it. It was said in the statute, and reiterated
19 by the Supreme Court in their, in the decision, the Wolens
20 decision.

21 The 1984, as you noted and as he admitted, affected
22 a pretty big change. It took out the word "interstate" and it
23 left the word "foreign commerce," or it left the rest of the
24 terms that include foreign carriers and foreign commerce.
25 There's nothing in the legislative history to suggest why, but

1 it's out.

2 And the statute that we're dealing with now is the
3 statute with the provision that has -- if you read the whole
4 language of that paragraph clearly in context, does not stop
5 with the word air carrier, and Abdu-Brisson was the proper
6 analysis of it.

7 THE COURT: I'm sorry, I didn't follow you. You say
8 Abdu-Brisson is the proper analysis?

9 MR. SHERMAN: I'm sorry, I used the wrong case.
10 Lawal is the proper analysis. Abdu-Brisson was the wrong
11 analysis.

12 You know, again, Your Honor, we agree with you --
13 I'm sorry. The case of Culian, Mr. Lovell raised and
14 suggested that this is a Second Circuit authority that you
15 must follow on air carrier versus foreign air carrier. Not at
16 all.

17 Culian was a case about a criminal prosecution of an
18 individual for bringing firearms onto a plane. And that
19 decision looked at an entirely separate provision in making
20 the point about carrier versus air carrier. We don't deny --

21 THE COURT: Air carrier versus foreign air carrier.

22 MR. SHERMAN: Air carrier versus foreign air
23 carrier, yes.

24 We don't contest that, as a general matter, those
25 two provisions are set out separately in the statute. But

1 they can't cite -- there are no cases, which examine the term
2 in the preemption provision and come to the conclusion that
3 they want to come to.

4 THE COURT: Well, but the interesting part of the
5 argument, though, is that you are saying that I should look at
6 the deletion of interstate from air transportation and rely on
7 the statutory definition of air transportation in interpreting
8 that portion.

9 MR. SHERMAN: I'm just noting that it's out. So
10 that the statute that we're dealing with now is, I mean, I'm
11 not sure why it matters that he went back to the original
12 1978, when in 1984 the words were taken out. The statute as
13 it stands today doesn't have that --

14 THE COURT: Right, but what I'm saying is that the
15 phrase "air transportation," what does that mean? You're not
16 relying on the broader definition of air transportation as set
17 out in the FAA, which was up there. You're just saying
18 whatever it means, it means. And the fact that they took out
19 interstate means it must be broader than just interstate air
20 transportation.

21 MR. SHERMAN: Exactly. Exactly.

22 And Your Honor, the fact that, let's accept
23 Mr. Lovell's argument for a minute, although I don't think you
24 need to go to legislative history.

25 The fact that Congress in 1978 may have been focused

1 on domestic deregulation does not say anything in the absence
2 of a specific statutory prohibition against applying this to
3 foreign carriers. It doesn't say anything about whether it
4 ought to be applied.

5 The preemption provision is clear, if you read it in
6 its entirety. And every case that's examined it, every court
7 that's examined it, has held that it applies to foreign
8 carriers. I suggest that this court should do the same.

9 THE COURT: Okay. Thank you.

10 Mr. Lovell? There you are. I'll give you, I mean
11 you can have a few minutes.

12 ARGUMENT III

13 BY MR. LOVELL:

14 MR. LOVELL: I know it's five to 1:00, Your Honor.

15 I want to go over the Morales decision. In their
16 reply brief they made a new argument that although -- I think
17 it's more efficient if I just say what happened.

18 THE COURT: Yes.

19 MR. LOVELL: Morales, the Attorneys General's who
20 were involved never raised the foreign air carrier issue until
21 the schtunkey (phonetic) plaintiff in the Lawal case contacted
22 them when they did their reply brief in the Supreme Court and
23 said hey, you want to argue this. In their reply brief they
24 raised for the first time an issue that wasn't in the
25 questions presented, that wasn't in the Court below. It had

1 never been considered by any court. And the Supreme Court
2 said nothing about it.

3 So, we cited all of these Supreme Court decisions,
4 involving Supreme Court jurisprudential rules when they don't
5 decide questions that aren't included in the questions
6 presented originally, weren't raised in the Court below, only
7 appear in a reply brief.

8 But then, the defendants came back, and so,
9 therefore Morales does not address this. It was not raised.
10 The res judicata with the Attorneys Generals in that case,
11 yeah, but it's not stare decisis for anybody.

12 In their reply brief the defendants come back and
13 say well, they must have really considered it, it must really
14 be law because it was the only way there would have been
15 subject matter jurisdiction over the foreign air carriers is
16 if there was an ADA preemption issue as to them, so they had
17 to think about foreign air carriers. Not true. The 10
18 intervening foreign air carriers intervened as of right under
19 24A. British Airways was likewise entitled. That's in our
20 bullets, and I've given the slides to everybody.

21 Moreover -- this is the last bullet, Your Honor --
22 not one of the defendants' subject matter jurisdiction cases
23 holds or implies that a foreign air carrier could use the ADA
24 preemption provision to establish Federal jurisdiction. It
25 wasn't in the case.

1 So, Your Honor is left with the statute, not --
2 Morales didn't take this away from it. In the defendants'
3 opening papers, they said: Interpret the statute. In the
4 reply papers, they put in five new arguments. One which is,
5 you can't interpret the statute, Morales is decided. Not
6 true.

7 So the whole issue comes down to this, Your Honor.
8 The defendants do not say that the '78 statute covered foreign
9 air carriers. And I wouldn't expect Mr. Sherman unnecessarily
10 to say that, and that's fine.

11 But their whole argument comes down to this. Would
12 you put the '84 statute up.

13 (The above-referred to slide was published to the
14 courtroom.)

15 MR. LOVELL: I submit to Your Honor, that if you
16 take their data points and compare it -- go to the preemption.
17 The '84 preemption.

18 (The above-referred to slide was published to the
19 courtroom.)

20 MR. LOVELL: It all comes down to this, Your Honor.
21 Mr. Sherman says, if it stops at air carriers, the foreign air
22 carriers would have no preemption. It all comes down to
23 having authority under subchapter four of this chapter to
24 provide air transportation. Okay. That has full meaning if
25 it's limited to air carriers. That does not need to be

1 exploded into foreign air carriers to have meaning. I think
2 if Your Honor looks at their data points, the South African
3 Air case, the statute could have no meaning unless you gave up
4 the normal way of doing things and applied this to South
5 Africa.

6 THE COURT: You'll have to just explain that in a
7 little more detail. I'm not following that argument.

8 MR. LOVELL: In South African Airways, which is not
9 a Second Circuit case, Congress only used the word air
10 carrier, but they did apply the statute to South African
11 Airways. And it was anti-Apartheid Act. The only one who
12 could be covered was South African Airways. Airlines.

13 THE COURT: No, but what I'm focusing on is that
14 phrase, "having authority under subchapter four of this
15 chapter to provide air transportation."

16 MR. LOVELL: Yes.

17 THE COURT: "As a delimitation, or as an expression
18 of what the words air carrier means."

19 And so that, to the extent that an air carrier has
20 authority under subchapter four of this chapter to provide air
21 transportation, it is covered. That's their argument, I
22 think.

23 MR. LOVELL: Yes, and that's true.

24 THE COURT: And so, but you were saying somehow
25 that's --

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1 MR. LOVELL: Sorry, Judge. I know I'm interrupting.

2 THE COURT: That's all right, go ahead.

3 MR. LOVELL: My answer's already there. An air
4 carrier is not a foreign air carrier. Over and over again, 52
5 times.

6 THE COURT: Okay, I see.

7 MR. LOVELL: Congress says air carrier and foreign
8 air carrier. This 2 and 3 are limiting phrases on air
9 carrier. They are not expanding phrases to throw it out, and
10 that's why I say just look at the statute.

11 Do you have the statute?

12 (The above-referred to slide was published to the
13 courtroom.)

14 THE COURT: Why is it not, why is it not, why is the
15 Court, I guess your argument is the Court should always
16 interpret air carrier, that phrase, consistent with the
17 definition provided elsewhere in the act unless it is clear
18 that the --

19 MR. LOVELL: That's what we're trying to say.

20 THE COURT: -- unless it's absolutely clear that it
21 was not meant to.

22 MR. LOVELL: Yes. In those data two points that
23 they have, yes, that's my argument. Under the Second Circuit,
24 you always have to interpret air carrier to be air carrier
25 unless there is no other way to do it. And their two data

1 points, 44904 and the South African Airways case put the
2 Hobson's choice to the Court. And there is no Hobson's choice
3 here.

4 You can easily -- and here's two other sections
5 here. Here's just examples of 52 times when Congress uses
6 both. 49 U.S.C. 40109(a)(1): "An air carrier not engaged
7 directly in operating aircraft in air transportation."

8 Well, the defendants' reading is air transportation
9 could pick up part of -- no, no, but Congress always goes on.
10 "B: A foreign carrier not engaged directly in operating
11 aircraft in foreign air transportation."

12 Over and over, Congress will use both terms, and
13 both will have an adjective restricting phrase afterwards.
14 And we put 26 examples in our brief. And the Lawal case is
15 just wrong.

16 Lawal is just wrong. Lawal thought, as defendants
17 argue, that that expanded the first. I know it's 1:00
18 o'clock, Judge, I better stop.

19 THE COURT: I understand.

20 MR. LOVELL: It narrows the phrase, Your Honor. And
21 because it narrows the phrase, Your Honor is not confronted
22 with the situation of those two cases.

23 Your Honor can give full meaning to the statute by
24 reading it the way the plaintiffs want to. And Your Honor
25 does not read the statute, and renders the definition

1 superfluous if you use those data points that the defense has,
2 of those two cases, and bring it in here when the statute
3 makes perfect sense this way.

4 THE COURT: What renders what superfluous? That's
5 the part of the argument I'm not following.

6 MR. LOVELL: The definition -- in other words, to
7 read the statute doesn't just mean read this section. It
8 means read from 1938 forward. Air carrier and foreign air
9 carrier are different. And the minute you say you're
10 exploding air carrier into a shorthand term for air carrier
11 and foreign air carrier, you are rendering superfluous the
12 statutory definition, which is in the first hierarchy. You're
13 supposed to look at all the language in the statute in
14 interpreting any provision.

15 THE COURT: I see.

16 MR. LOVELL: Okay. And that's what Lawal did.
17 Lawal rendered the definition superfluous in order to say the
18 broadest possible meaning, if we get to the -- the broadest
19 possible meaning of having authority in air carrier. In order
20 to give the broadest possible meaning of that, I am going to
21 disregard the statutory definition of air carrier. 52 other
22 provisions of law would have to change. All the times that
23 the defendants have gotten the benefit of this in all their
24 cases, everything would have to change if there's an adjective
25 phrase that could apply to both.

1 THE COURT: Okay. I think I get it.

2 MR. LOVELL: It can only apply to foreign air
3 carrier.

4 MR. SHERMAN: I'm sorry, can you give me one more
5 minute?

6 Mr. Lovell's presented sort of a moving target. I
7 just want to make sure that at least one or two things that he
8 said are clear for the Court in terms of defendants'
9 provision. I'm happy to do from here.

10 THE COURT: All right.

11 MR. SHERMAN: Thank you, Your Honor.

12 On the Morales and Maddox case, the Morales case,
13 Maddox below. First of all, as the Lawal Court held, as many
14 courts have held, on a question of subject matter jurisdiction
15 there can be no waiver.

16 THE COURT: All right. I follow that argument.

17 MR. SHERMAN: All right. The Lawal, the Court
18 specifically held that "Congress preempted this area to
19 maintain uniformity and avoid the conclusion and burdens that
20 would result if interstate and international airlines were
21 required to respond."

22 So, it wasn't just raised that the question of
23 international was present below as well as in the Supreme
24 Court.

25 Mr. Lovell said we concede -- and if I gave this

1 impression to the Court, I apologize -- we don't concede that
2 if you stop at the word air carrier, that there's no
3 preemption for foreign airlines.

4 We say when you look at the whole provision, it's
5 clear. But the problem is that even if you were to stop at
6 foreign air carrier --

7 THE COURT: At foreign?

8 MR. SHERMAN: I'm sorry, at air carrier, what they
9 suggest just makes no sense in the larger context of the
10 statute.

11 Congress intended to deregulate the airline industry
12 and specifically with regard to rates, routes and services.
13 It would make no sense in doing that if, without saying
14 anything, what they intended to do was not allow any Federal
15 regulation, but indeed allow all the states and indeed
16 subdivisions of the states.

17 THE COURT: I understand that. Although one would
18 have to concede that before the words interstate air
19 transportation came out, interstate came out, and that it was
20 designed to only affect domestic.

21 MR. SHERMAN: No, I don't agree, Your Honor.

22 THE COURT: You don't concede that?

23 MR. SHERMAN: No. The statute was focused on
24 interstate. Although it's not clear whether they meant
25 interstate as opposed to intrastate, because they specifically

1 allowed continued regulation of airlines within the state.
2 But without any express provision about the foreign air
3 carriers, I don't agree that interstate necessarily meant at
4 that time.

5 THE COURT: Okay.

6 MR. SHERMAN: And in terms of the Lawal, of course
7 Mr. Lovell's going to say it's wrong. How could he say
8 otherwise? It directly defeats their position.

9 There's a rule of construction that Congress has
10 presumed to be aware of decisions. The Lawal decision, the
11 Morales decision, all happened before the 1994 recodification
12 where Congress made no substantive change in the statute.

13 I suggest that this court should do what every other
14 court has done in looking at this provision.

15 THE COURT: All right. I've got it. Thank you,
16 folks.

17 We'll reconvene at 2:20. That gives us an hour and
18 15 minutes.

19 MR. HAUSFELD: Your Honor, may I request, what is
20 the agenda for this afternoon?

21 THE COURT: Well, we'll pick up in the order that we
22 had before. I can't remember. Let me see.

23 I think we start off with the foreign law claims.

24 MR. HAUSFELD: Thank you.

25 (Continued on following page with AFTERNOON SESSION.)

Argument III / Lovell

1 AFTERNOON SESSION

2 ARGUMENT III.

3 BY MR. LOVELL:

4 THE COURT: All right.

5 MR. LOVELL: Your Honor, Chris Lovell. Could I,
6 talking at lunch about the oral argument, and being used to
7 singing for my supper for 30 years as a contingent, we would
8 like to put in a three-page letter, if that would be okay, to
9 cover the point at the end about what the statute means when
10 interstate run out.

11 THE COURT: I've got so much paper here. If I let
12 you put in three pages, they would want to put in six, and
13 then you'll want three more. Is it something that really is
14 not within the papers that you already submitted?

15 MR. LOVELL: Well, your Honor, I actually don't
16 know. If you will accept our surreply, the answer is
17 two-thirds yes, because you haven't accepted our surreply,
18 and one third is pulling something out that is more directly
19 responsive going over how Congress handles this situation and
20 other things. It is in our brief. It is in the brief that
21 we put in, our paper brief. So, I mean, I could do two pages
22 and leave out what I already covered. Two pages. Will you
23 take two pages?

24 THE COURT: I think I think anxious what point it is
25 you want to elicit.

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1 MR. LOVELL: Sorry, your Honor. Congress when it
2 has wanted to include foreign air carry in a provision has a
3 pattern in the legislative history and changes in the statute
4 it has done. It is like your Honor said, if air carrier can
5 only have a meaning that relates to the foreign air carry,
6 that's one thing. I wanted to pull that stuff out of our
7 brief and show it to your Honor.

8 THE COURT: Out of the brief that you already
9 submitted, though?

10 MR. LOVELL: Well, no. Some of it is in the
11 surreply. Only in the reply did they bring up one of the
12 issues. They only brought up this 44901 in their reply and
13 we haven't addressed that at all.

14 THE COURT: You want to address 44901?

15 MR. LOVELL: Yes.

16 THE COURT: And that was on the notion that it was
17 only addressed in the reply papers, I mean?

18 MR. LOVELL: Only came up in the reply. But the
19 Overlobby? case (ph) and the South African Airways case were
20 the other two parts of the letter, your Honor.

21 THE COURT: I see.

22 Mr. Sherman, is it true that you raised this in your
23 reply? I mean, I'm not saying there's anything wrong with
24 that. But should I give Mr. Lovell a chance to put in his
25 two cents on that? You will say no, and I will say, what if

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1 I give you your two pages on it?

2 MR. SHERMAN: Let me tell you why the answer for us
3 is no. The same reason we didn't think that their surreply
4 should be accepted by the court. We made the basic argument,
5 which I tried to make today, the plaintiffs raised a number
6 of arguments in their lengthy opposition. We attempted to
7 respond to those arguments in the reply. We didn't raise new
8 arguments in our reply. We responded to their argument.

9 I think it is safe to say that Mr. Lovell here today
10 had a chance to make all of the points that he made in his
11 surreply, and he made a lot of the points. As far as I could
12 tell, he may have made them all between what he said and the
13 power point he put out and handed up to the court. We don't
14 think there's any reason for the court to have any further
15 briefs on this.

16 THE COURT: Mr. Lovell, you make a very attractive
17 presentation, but I do think that the points you made are
18 adequately covered. They were adequately covered in your
19 argument, and if I permit further papers on this, I will get
20 those same requests with respect to every other issue that we
21 touch on today, and I have quite enough.

22 MR. LOVELL: I understand.

23 THE COURT: I mean, I did get your handout. I think
24 it was useful in terms of tracking through your argument.
25 And I do have the benefit of the transcript, which we will

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1 undoubtedly be consulting. So I don't think any of the
2 points that you made will be lost.

3 MR. LOVELL: Thank you.

4 THE COURT: All right. So let's move to item number
5 four, Foreign Law Claims. Give me a moment. Let me pull out
6 my papers and we'll get started on that.

7 Mr. Warnot?

8 ARGUMENT IV

9 BY MR. WARNOT:

10 MR. WARNOT: James Warnot of Linklaters LLP for
11 Societe Air France, and I'm making this argument on behalf of
12 the entire defense.

13 As your Honor noted, Mr. Ogden would be arguing as
14 well. Lufthansa has made a separate motion on the foreign
15 law claims, and we have discussed in advance how we are going
16 to handle this. So we'll try, to the extent possible, to
17 eliminate duplication of what we say.

18 Broadly speaking, the issue before the court is
19 whether this is going to be the first U.S. court to accept
20 litigation in the United States of a European union statutory
21 antitrust claim between a bunch of foreign parties involving
22 conduct that occurred outside the United States. That's what
23 plaintiffs are asking you to do by accepting jurisdiction in
24 this case. This motion applies to four of the counts, Counts
25 Four, Five, Six and Seven, and at least as to a couple of

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1 those counts, they don't impact the United States in any way
2 because they are for shipments from the EU to places around
3 the world, except for the United States.

4 THE COURT: Just to help me out, because I
5 consistently get confused about this, Counts Six and Seven
6 are claims involving entirely overseas transactions,
7 transactions that took place overseas, and shipments that
8 went from point to point outside of the United States?

9 MR. WARNOT: That's Seven.

10 THE COURT: That's seven.

11 MR. WARNOT: Six is mixed U.S., non U.S. it is only
12 foreign plaintiffs. The class is composed of people outside
13 of the United States, both direct and indirect purchasers,
14 and the shipments at issue are shipments from the EU, places
15 outside of the United States, as well as to the United
16 States, but only under Article 81.

17 THE COURT: Right. Well, some of those would be
18 encompassed elsewhere, would they not?

19 MR. WARNOT: Well --

20 THE COURT: Would be encompassed under some of the
21 other counts, Sherman Act counts?

22 MR. WARNOT: Potentially Counts Four and Five are
23 somewhat different classes.

24 Count Four is the direct U.S. purchaser -- excuse
25 me, direct U.S. shipments where the class members are

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1 entities within the European union who are making shipments
2 to the United States and direct purchasers.

3 Count Five is the same thing, except they are
4 indirect purchasers. But the class -- both the class
5 representatives and the class definition were all in favor of
6 those Europeans only.

7 THE COURT: Okay. Right.

8 MR. WARNOT: The way I want to proceed, your Honor,
9 is to first examine jurisdiction, does the court have
10 jurisdiction? And then, you know, if it were to have
11 jurisdiction, should it exercise that jurisdiction? And,
12 finally, do the plaintiffs state a claim for relief, assuming
13 the answer to the first two is "yes."

14 So the first question is, is there jurisdiction
15 under the Class Action Fairness Act, CAFA. And CAFA, as I'm
16 sure the court is aware, has relaxed diversity of citizenship
17 requirements and has a relaxed amount in controversy
18 requirement, and it permits its class members to aggregate
19 individual amounts of controversy. But it has the
20 requirement that it is a class action, and in assumption in
21 that is that it is a claim properly brought as a class
22 action. And the short answer to whether in fact the claim
23 like this has been answered by judges of this court three
24 times in the last year and a half, as well as by Judge Baer,
25 and we talked quite a bit in the papers about the Bonime

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1 case.

2 In addition, we cited Judge Bianco's decision in
3 Holster v. Gatco, in March 2007. What we didn't cite was
4 Judge Block's Gratt v. Eurotravel, 2007 West Law 2693903,
5 very similar case, though. And of similar import is Judge
6 Baer's decision in Giovanniello v. New York Law Publishing in
7 August of 2007.

8 In each of those cases, there was a claim, actually
9 a federal statute, but a federal statute for can there was no
10 federal question jurisdiction, and a claim that could only be
11 brought under the state procedures. And under the statute in
12 New York, again not the statutory class action procedures,
13 but it is a statute that determines whether something can
14 even be brought as a class action. Those claims could not be
15 brought as a class action in state court, because in fact
16 they had a statutory penalty associated with them.

17 In analyzing that case, I would just look to Judge
18 Amon first. She said that provision for eerie purposes, it
19 is substantive, rather than procedural, and, as a result, the
20 state law governs. There can't be a class; therefore, you
21 can't have CAFA; therefore, there's no subject matter
22 jurisdiction. And it is very clear in that case that the
23 basis for the decision wasn't anything peculiar about the
24 language of the underlying statute. It was the fact that the
25 application of CPLR 901(b), which was a state statute

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1 prohibiting a class action in those circumstances, was
2 substantive because it was determinative of whether the
3 outcome would be the same in state or federal court, and the
4 rule of guaranty trust.

5 We had the same situation here. There's no New York
6 State statute. We have claims brought under foreign law, and
7 the same rulings apply in diversity cases, whether it is
8 state law or foreign law, in which for each EU member state
9 it's a fundamental aspect of their law, the claims are
10 personal and they can't be brought on a class basis, at least
11 not on a class basis as we know it here, namely an opt out
12 class action. And there doesn't seem to be any dispute on
13 that from plaintiffs.

14 Now, what plaintiffs are saying is that in fact all
15 we are arguing is that there's a different rule of procedure.
16 It conflicts with Federal Rule of Civil Procedure 23, and,
17 therefore, under Hanna v. Plumer, the federal rule controls.

18 The first problem with this argument, it's been
19 rejected by the courts that have ruled on this issue
20 recently. It was only done inferentially, really, by Judge
21 Amon in her decision in Bonime. There's a footnote referring
22 to the issue that having been decided in the other case, and
23 it was addressed directly by Judge Bianco in the Holster
24 case, by Judge Block in the Gratt case, and by Judge Bear in
25 the Leider v. Ralfe, which is discussed in more detail in the

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1 papers. The reason that these courts looked at it in this
2 way is because they held that Rule 23 establishes
3 requirements for class certification, commonality, et cetera,
4 et cetera; whereas, there's a threshold question as to
5 whether a particular claim is even eligible for class
6 treatment in the first place. That's what CPLR 901 really
7 addresses.

8 Actually, in CPLR 901, which is the New York Class
9 Action statute, 901(a) is really the counterpart to Rule 23
10 where you look at whether a class is certified; but 901(b)
11 establishes a substantive rule saying you can't have a class
12 action in circumstances like the circumstances present in
13 that case, and those are the same circumstances present here.

14 Now, one thing that I should note that both the a
15 and Holster cases are presently on appeal to the Second
16 Circuit, and that appeal was argued on March 12th, and
17 presumably sometime before too long we are going to have a
18 decision.

19 The second point is if there's no diversity
20 jurisdiction, should the court exercise supplemental
21 jurisdiction?

22 The parties haven't really argued about whether
23 there's a common separate act. I think for purposes of this
24 argument we are not disputing that, but there are three
25 reasons that the court shouldn't exercise supplemental

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1 jurisdiction.

2 The first one is the same reason the court shouldn't
3 exercise diversity jurisdiction, namely that the nature of
4 this claim bringing an Article 81 as a class action, when
5 that is not recognized, and it would be, you know,
6 fundamentally contrary to European law. It is no less
7 abhorring under supplemental jurisdiction, than it would be
8 under diverse jurisdiction. Judge Baer ruled to that effect
9 in Leider v. Ralfe, which was in a little bit of a different
10 context, because there the defendant had defaulted and he was
11 looking at class certification, but he so held, and we cited
12 that in our papers.

13 In addition, you need to look to the factors under
14 28 U.S.C. 1367(c), two of which we relied upon for saying
15 there shouldn't be supplemental jurisdiction.

16 The first is complex issues of foreign law.

17 Now, the plaintiffs say, oh, this is really simple.
18 You got Article 81. You got Section One. They both prohibit
19 agreement, and that's the end of the story. There's nothing
20 complex about it at all. I mean, there are a whole lot of
21 problems with that.

22 First of all, their main claims under English law,
23 which I will get to later, doesn't cover most of the class
24 members here, but was just under English law. There are
25 still a lot of issues that are not at all simple, and in fact

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1 are decided under English law, probably for most of which is
2 the status of the pass on defense and whether indirect
3 purchasers have standing.

4 As set forth in our declaration of Richard Plender
5 QC, both of those issues are undecided under English law, and
6 those issues are obviously very important to the case. You
7 know, would we have the pass on defense, the direct
8 purchasers to the indirect purchasers have claims, meet
9 pretty fundamental issues in this case.

10 So where those things are undecided, it would be
11 inappropriate to be asking you to decide these issues of
12 English law, when English courts haven't decided yet; and the
13 fact that an issue of foreign law has not yet been decided,
14 it is in fact one of the factors that the courts rely on in
15 rejecting supplemental jurisdiction.

16 In addition to that, there's I guess I will call it
17 the catchall provision of 28 U.S.C. 1367(c), or the so-called
18 exceptional circumstances provision.

19 Now, clearly, exception means exception, rather than
20 the rule. But, you know, as the Ninth Circuit held in the
21 Executive Software case, which was adopted as the standard in
22 the Second Circuit Russian News Agency case, that inquiry is
23 not particularly burdensome. You have to look at the
24 surrounding facts and see whether this indicates that it
25 makes sense to keep it in this court. As in our papers, the

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1 same comity considerations for arguing that it should be
2 dismissed on comity considerations alone, would constitute
3 the exceptional circumstances.

4 I then move on to a form non-convenience. All I am
5 going to say on that, Mr. Ogden will be arguing it, and we'll
6 be relying entirely on his argument.

7 The secondary discretionary argument is the doctrine
8 of comity. Again, Mr. Ogden will largely handle that, but I
9 would like to make a couple of points.

10 Plaintiffs whole opposition depends upon their
11 argument that you can't have a comity dismissal unless
12 there's a conflict between the law that is sought to be
13 applied and U.S. law.

14 Now, we say that is wrong as a matter of law.
15 Lufthansa articulates it somewhat differently. We followed
16 the language in Justice Scalia's dissent in Hartford Fire in
17 which we say there's prescriptive comity and prescriptive
18 comity is a doctrine where a plaintiff seeks to have a United
19 States court apply U.S. statutory law for conduct occurring
20 outside the United States. In that situation, what the court
21 has to look at is, is there in fact a conflict - and there's
22 a provision in the cases about how strong that conflict has
23 to be - but is there a conflict between charging someone
24 based on exterior conduct under our laws versus having been
25 treated under the laws of jurisdiction in which they acted.

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1 That's really the only context in which an analysis makes
2 sense.

3 Comity, of course, is a much more flexible doctrine.
4 In fact, in the Biggio case in the Second Circuit, when the
5 lower court had dismissed on comity grounds, based on a case
6 in the Ninth Circuit called Timberlane, which essentially
7 applies the same test, you look at whether there's a
8 conflict. The Second Circuit in Biggio said that's the wrong
9 test. The test in this case is whether adjudication of the
10 claim would offend amicable working relationships with the
11 other sovereign, and for a whole host of reasons that
12 plaintiffs really haven't contested because they relied so
13 much on this conflict argument. That's certainly the case,
14 and I will permit Mr. Ogden to get into all of those, and not
15 bog this proceeding down with covering it twice.

16 I want to spend just a couple of minutes addressing
17 the notion that accepting jurisdiction would advance comity.
18 This is an argument that plaintiffs put forward. Our
19 response to that would be, with all due respect, that's
20 certainly more. It is nothing more than displaying attitude
21 that we in the United States know best how to litigate, and
22 we in the United States know best how to handle your claims.
23 And it's in the context of a situation where Europe's highest
24 court has said to national courts, you must adjudicate these
25 claims. You must provide a remedy for people in Europe.

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1 It is almost like saying because it takes us 50
2 years to try to implement Brown v. Board of Education, that
3 courts in some other countries should take on those claims.
4 European courts being around for a long time have established
5 procedures. Whether we disagree or agree with those
6 procedures doesn't advance comity to take away those cases
7 from them here in the United States. There's no connection
8 to them.

9 I would lastly turn, assuming the court has
10 jurisdiction and decides appropriately to exercise that
11 jurisdiction, have they in fact stated a claim?

12 So they stated the claim two different ways.

13 The first way is directly under Article 81 and
14 Article 53 of the EEA, and that clearly doesn't state a
15 claim. I don't think they are really trying to say anymore
16 that it does. Certainly their experts say you can't do that
17 because properly stating the claim under Article 81 is an
18 amalgam of both European law and member state law. But in
19 addition to that, they stated a claim under English law that
20 incorporates Article 81, then you need to look at English law
21 and see in fact how that works with respect to this class.

22 What the plaintiffs' expert has said is - and again
23 when I say plaintiffs' expert, what I'm really referring to
24 is plaintiff's co-lead counsel's partner sitting in London,
25 but we'll put that aside for a minute - he notes that the

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1 plaintiffs have pleaded English law and assume,
2 quote/unquote, that our conflict laws would permit those
3 claims to be the entire class. I would say that's a bad
4 assumption.

5 First of all, our conflicts laws, looking at classic
6 New York interest analysis and looking at the claims of a
7 freight forwarder in Austria shipping product to Singapore,
8 how is it that English law -- that our conflict ruling were
9 points to English law? It is an impossibility. Our expert
10 has indicated English laws are not much different from that.
11 Our expert Richard Plender QC, who I would add since February
12 1st is Mr. Justice Plender in high court.

13 THE COURT: Not your partner.

14 MR. WARNOT: Not a partner, but maybe it adds a
15 little something to his declaration. He explains how it
16 would work if they try it, assert the claims of the entire
17 class under English law as pleaded.

18 First of all, is the issue of class members who have
19 nothing to do with England, and where the conduct at issue
20 has nothing to do with England and produces no effects on
21 England. Those claims would fail to state a claim for relief
22 under English law. And I have not seen anything
23 contradicting that from anything put in by the plaintiffs,
24 because they have in fact just assumed that England law
25 covers everything.

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1 The second category of individuals are people who
2 are not named plaintiffs, but who in fact perhaps might be
3 residents in England, and against who perhaps conduct may
4 have been directed. As to those, because of the absence of a
5 class mechanism in England, they won't state a claim another.
6 So by our count, that leaves us Volvo Logistics (UK) Limited,
7 and that's it. That all of the rest, Counts Four, Five, Six
8 and Seven fail to state a claim. Unless you have questions,
9 I will turn it over to Mr. Ogden.

10 THE COURT: One question.

11 Mr. Ogden will be addressing for non-convenience, as
12 I understand it, but one of the steps in the Court's analysis
13 is whether there's an adequate alternative forum. Maybe you
14 can address that on behalf of all of the other defendants, as
15 opposed to just Lufthansa, who is carrying its freight only
16 for Lufthansa.

17 MR. WARNOT: Yes. We are adopting their argument as
18 well. Very simple, the requirement of an adequate
19 alternative forum doesn't require the procedures to be the
20 same; doesn't require the remedies to be the same.

21 THE COURT: But is there a single forum where this
22 could all happen?

23 MR. WARNOT: I don't view that as requiring that
24 there would be -- that there needs to be a single forum where
25 this could all happen, where class actions aren't allowed in

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1 Europe. What you got is a situation where European court of
2 justice, to which all member states have agreed to abide by
3 its decisions, has said you must provide a remedy. There's
4 nothing in form non-convenience law that I know of that says
5 where you bring a claim on behalf of a widely scattered class
6 - and in fact that claim is not properly brought as a class
7 action - that there has to be a single forum for each and
8 every one of those class members in bringing a claim.

9 THE COURT: Okay.

10 (Continued on the next page.)
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1 ARGUMENT IV (Continued)

2 BY MR. WARNOT:

3 MR. WARNOT: And in fact that claim is not properly
4 brought in the class action. Because there has to be a single
5 forum where each and every one of those class members can
6 bring a claim.

7 THE COURT: Okay. All right.

8 MR. WARNOT: Thank you.

9 ARGUMENT IV

10 BY MR. OGDEN:

11 MR. OGDEN: David Ogden, Your Honor, for Deutsche
12 Lufthansa AG, Lufthansa Cargo and Swiss International
13 Airlines, three companies under common ownership that are not
14 members of the joint defense group, somewhat differently
15 situated. My clients are leniency applicants.

16 As you know, Your Honor, we've been accepted into
17 the liens and programs of both the Justice Department here in
18 the United States and the European Commission.

19 And as Your Honor is also aware, we have, our
20 clients have reached a settlement with respect to all U.S.
21 represented commerce preliminarily approved now by the judge
22 following your recommendation, which includes Counts 1 through
23 5 and such parts of count 6 and 7 as involved commerce to,
24 from or within the United States.

25 What we have not settled, my clients have not

1 settled, Counts 6 and 7 to the extent they involved commerce,
2 as Your Honor put it, exclusively in points in Europe and
3 places elsewhere in the world, not including the
4 United States. Claims that are brought in by the plaintiffs
5 only pursuant to European law in the course of their
6 complaint.

7 Now we do, although not a member of the joint
8 defense group, we do agree with the arguments that Mr. Warnot
9 has made and that the other defendants have made with respect
10 to those claims. And we agree that there's no jurisdiction
11 under CAFA, and should not be jurisdiction as a matter of
12 supplemental jurisdiction in this court, for the reasons that
13 they've stated and I will revisit them.

14 But we make the further submission, Your Honor, that
15 even if there were jurisdiction here, they would be
16 appropriate for this court to dismiss under the principles of
17 foreign nonconvenience and under the principles of comity,
18 which are related doctrines, but doctrines that are distinct.
19 And I want to make just a few points in support of that
20 submission.

21 First, I think it is difficult to imagine a set of
22 claims that could be configured in a way that would be more
23 appropriate for foreign nonconvenience dismissal than these.
24 The Gilbert case, which addresses the doctrine at the Supreme
25 Court level, talks about the question being a question of the

1 nexus of this forum versus the other forum to the facts and
2 the law involved in the claims. And here, with respect to the
3 claims that we're talking about, we have exclusively foreign
4 commerce, indeed the United States is the only country in the
5 world that is not connected to the commerce that's at issue in
6 this count because it is between Europe and everywhere else.

7 Exclusively foreign law, only under the law of these
8 claims, only sought to be adjudicated under the law and under
9 the law of England. Exclusively foreign named plaintiffs.
10 All of the named plaintiffs that have come before this court
11 to advance these claims are domiciliaries of foreign
12 countries.

13 THE COURT: I thought that six was, wasn't that
14 foreign and U.S. mixed?

15 MR. OGDEN: Six is foreign and U.S. mixed commerce.

16 THE COURT: Commerce, but not domiciliaries.

17 MR. OGDEN: It doesn't -- but it is exclusively
18 foreign domiciliaries. But my point is, seven I think admits
19 the possibility of U.S. domiciliaries within the class, but
20 all of the named plaintiffs in Count 7 are foreign.

21 THE COURT: Okay.

22 MR. OGDEN: And similarly, with respect to Count 6;
23 all of the named plaintiffs are foreign. And so, that the --
24 so that the existence of U.S. based entities with those claims
25 are hypothetical, although possible from the point of view of

1 form nonconvenience doctrine, the key issue that other courts
2 have looked at is the residence of the named plaintiff because
3 it is they whose convenience is primarily at issue since they
4 will be prosecuting the claims.

5 And finally, the defendants are overwhelmingly
6 foreign. Two out of the 39 defendants are U.S. entities and
7 they are under common ownership. Now, in these circumstances,
8 there should be really no deference accorded to the
9 plaintiffs' choice of the U.S. forum. The case law, in
10 particular the recent decision in the Austrian ski train
11 disaster case, is perhaps the most recent one to identify that
12 if a foreign plaintiff decides to bring a case in the United
13 States based on foreign law and concerning primarily foreign
14 events, their choice of forum is due very little, if any,
15 deference. And obviously, their convenience is not
16 particularly served by it and it would appear to be a matter
17 of a forum chart.

18 I want to turn next to the critical issue that
19 Your Honor identified, which is the question as to whether
20 there is an adequate alternative forum.

21 And I think the answer to that is that clearly for
22 the claim that the plaintiffs have pled, which they seek to
23 rely entirely on EU law supplemented as it must be as
24 Mr. Warnot observed, by a national law, they relied entirely
25 on English law. And their expert witnesses have said England

1 under English choice of law principles would apply English law
2 to all of the claims. And that is the submission that the
3 plaintiffs have brought to this court in the United States.

4 We don't know entirely with certainty what choice of
5 law principles the English courts would apply, but that's the
6 claim that the plaintiffs have brought here. We think
7 clearly, England -- or if not England some other court in the
8 EU -- would be an adequate alternative forum. The test there
9 is whether the defendants would be amenable to service in that
10 other forum and whether the courts would permit litigation of
11 the subject matter of the claim, that's Pollack's holding, for
12 example. The Second Circuit lays that out, but that's really
13 black letter law.

14 With respect to amenability to service, the
15 plaintiffs have not intended that any defendant is not
16 amenable to service in England, for example. And their
17 experts, Mr. Layton and Mr. Smith, have explained in their
18 affidavit, in their declaration, they lay out the argument for
19 the reason why all defendants are amenable to service. They
20 say that because there are U.K. defendants, they can bring in
21 all other EU domiciled defendants pursuant to Article 6(1) of
22 Regulation 44/2001, which allows all EU domiciled
23 co-defendants to be brought in if there is a domiciliary
24 reform state who is a defendant, and in the interest of
25 justice so serve. And again, it is the opinion of plaintiffs'

1 expert at paragraphs 24 to 25 and paragraph 30 of the Layton
2 and Smith affidavit.

3 And with respect to non-EU, the non-EU defendants,
4 they also say they can be brought before a single English
5 tribunal pursuant to English Rule of Civil Procedure 6.20.
6 And this is laid out in their submission. And they say that
7 the rules in England would permit -- this is a quote: "The
8 concentration of proceedings and claims in a single
9 well-equipped English forum, further submitting the law would
10 apply to all the claims".

11 Again, whether or not that's so, the key point is
12 that the plaintiffs have not contested the amenability of
13 service of the defendants in England.

14 Second, as to whether England permits the litigation
15 of the subject matter of these claims, the Second Circuit has
16 already decided that issue resoundingly in the affirmative in
17 the Capital Currency Exchange decision, which is a
18 Second Circuit decision 1998 where plaintiffs sought to bring
19 claims under the Sherman Act. And the Second Circuit approved
20 dismissal of those claims under forum nonconvenience so that
21 they could be litigated in Europe under European law saying
22 that Europe courts are open and provide a remedy. It's not
23 identical, but it doesn't have to be. And they sustained the
24 dismissal there on the ground that England was an adequate
25 alternative forum.

1 And you know, that conclusion really is one that I
2 think as a matter of comity and respect for the coordinate
3 system of justice in Europe, this court really has to reach.
4 It is a principle of European law, which has been identified
5 in the Courage decision, which is cited in all of the papers;
6 that the member states must provide an effective remedy for a
7 violation of rights under Article 81. The remedy must be
8 effective if there's a violation of rights and the court has
9 set aside actual rules that limit that in any respect. That
10 means that it can't be practicably impossible or excessively
11 difficult. That's the formulation that the Europeans insist
12 that the national courts observe in providing damages remedies
13 to persons whose rights have been violated under Article 81.

14 And so, particularly given the Second Circuit's
15 ruling, but as a matter of respect for that system, this court
16 I don't think could take the decision that the remedies
17 afforded will not be effected given that European courts are
18 fulfilling that mandate. So, we believe there's clearly an
19 adequate forum. I think plaintiffs' own experts have
20 identified that.

21 And then, when we turn to the convenience factors,
22 they overwhelmingly favor an English forum, Your Honor. There
23 is, as Mr. Warnot observed, a requirement for any court
24 carrying European law claims, whether that's this court or a
25 court in the EU, to decide any number of unresolved issues of

1 European law; issues under the European substantive law,
2 issues under national law. Mr. Warnot identified a number of
3 them, but they include standard fault that needs to be met to
4 recover damages, statute of limitations, whether exemplary
5 damages or other forms of damages are available, indirect
6 purchaser standing, the pass-on defense, standards for
7 causation. All of these arise and many of them are
8 unresolved.

9 THE COURT: In English law, too?

10 MR. OGDEN: Many of them, as Mr. Warnot observed,
11 are unresolved in English law as they apply to antitrust laws.
12 And even the Courage decision was a case in which an English
13 rule that limited the rights of a plaintiff who was a
14 participant in an illegal agreement to recover, that was a
15 rule of English law that the European court of justice set
16 aside saying that it interfered with the effective remedy.
17 And so, what English law is, how it applies to antitrust
18 claims and whether European law requires an adjustment in
19 those rules on any number of different respects will need to
20 be resolved.

21 Now, but it's clear that whatever the rule would be
22 in England as to whether English law governs every claim, it's
23 absolutely certain that that would not be the rule in this
24 court. This court would have to apply the forums choice of
25 law principle, not England's choice of law principle,

1 New York's choice of law principle under well-established
2 cases requires an issue-by-issue, claim-by-claim decision as
3 to what law governs so that claims of Portuguese shippers,
4 shipping between Portugal and Nigeria, would have to be judged
5 under an interest-balancing approach that would presumably
6 dictate a different law than English shippers shipping from
7 England to Russia, depending on the nationality of carrier,
8 where the agreement was reached, where the injury occurred. At
9 least all three in one jurisdictions of Europe will have their
10 laws in play in these European claims under New York choice of
11 law principles.

12 And consequently, the choice of law challenges faced
13 will be staggering. And even after you've decided what law
14 applies, you've got to decide what the law is when in many
15 cases it hasn't been squarely decided by that national
16 authority. Obviously, that exercise would much better be done
17 by a court in the European Union than by a court in the
18 United States.

19 Additionally, the location of the evidence here and
20 the difficulty of getting access to it will be far greater in
21 the United States, the difficulties, than in Europe. Now, the
22 plaintiffs have suggested that there are great efficiencies
23 potentially that could be obtained by litigating this matter
24 jointly; the U.S. and the European claims. But lots of
25 evidence is going to be given. These claims involve different

1 routes. They involve different carriers. They involve
2 different markets. They involve different forwarders and they
3 involve different shippers. All of that different
4 constellation is going to generate different analysis with
5 potential to impact on the market, damages, pass-on defense
6 and a host of issues where there will be individualized proof
7 required, and probably with respect to liability to the extent
8 that proof extends beyond surcharges to other issues. That's
9 going to be decentralized proof that's going to be found round
10 the world.

11 And in consequence of that, big issues will arise
12 with respect to the blocking statutes and privacy laws in
13 Europe where -- and utilization of the Hague Convention. All
14 these requirements, these barriers imposed by European law to
15 the U.S. discovery process will be a real problem in this
16 context. A much greater problem potentially.

17 THE COURT: Why greater than if they were over -- if
18 it was a, let's posit that there may be required, if this
19 court declines jurisdiction, multiple actions in multiple
20 different foreign states.

21 Then won't the same problems occur in terms of
22 getting access to records across national boundaries?

23 MR. OGDEN: The European legal system will allow,
24 through its own internal mechanisms, will allow the discovery
25 through the mechanisms of the European civil process, and the

1 regulatory system that's administered by the ECJ will allow
2 evidence to be obtained from between various different
3 entities in the EU. And because this evidence primarily
4 concerns travel between the EU and the rest of the world,
5 those mechanisms, the respect that the French are required to
6 accord to the U.K., or that the Germans are required to accord
7 to the Spanish, et cetera, will allow for the normal operation
8 of their evidentiary process and the discovery process to
9 centralize that information.

10 For this court it will be tough because this court
11 would be enforcing European substantive law and would be
12 looking at the issue as to whether to override European laws
13 that block discovery from the United States. It wouldn't
14 block discovery internal to the EU, but would block discovery
15 from the United States in the name of European substantive
16 law. I think the balance always comes out that European
17 procedural limitations would be --

18 THE COURT: All right. I have to limit your time.
19 You need to wrap it up.

20 MR. OGDEN: I appreciate that. I just want to
21 emphasize two other points.

22 One, is that the judgment from this court if it took
23 these cases would very likely not be enforced.

24 THE COURT: Certainly subject to collateral attack.

25 MR. OGDEN: Subject to litigation and substantial

1 attack.

2 And there would be a risk of parallel engaging going
3 on in Europe that would not be stayed under the principles of
4 European law.

5 THE COURT: I'm sorry, restate that last?

6 MR. OGDEN: European law, under the modernization
7 regulation as discussed in the Layton and Smith memorandum,
8 again at paragraphs 29 to 30, would call for a second file of
9 case in Europe on the same subject matter; generally to be
10 stayed in deference to a pending proceeding underway in
11 another EU country. But according to that affidavit, because
12 of the rights that a European plaintiff would have to
13 adjudication of claims under Article 81, they would not stay
14 that proceeding in favor of this one.

15 THE COURT: Well, have some such proceedings been
16 filed there?

17 MR. OGDEN: Not at this point. Not at this point.

18 THE COURT: Okay. Thank you.

19 MR. OGDEN: Thank you.

20 THE COURT: Mr. Hausfeld.

21 ARGUMENT IV

22 BY MR. HAUSFELD:

23 MR. HAUSFELD: Good afternoon, Your Honor.

24 THE COURT: Good afternoon.

25 MR. HAUSFELD: Sometimes I find that some bells and

1 whistles can be of assistance, and in this particular case,
2 there is an adage about old dogs needing to adapt every once
3 in a while. And so, I have adapted to some new technology.
4 But likewise, old laws sometimes need to adapt as well.

5 And as the Second Circuit stated in the Curley
6 versus AMR Corporation that the Courts in the Second Circuit
7 should be flexible in taking issues relating to the law of
8 foreign nations because such issues can be expected to come to
9 Federal courts with increasing frequency as the global economy
10 expands and cross-border transactions increase. And I think
11 both counsel for the defense aptly illustrated the fact that
12 this is a case which invokes applying old venerable good law
13 to new circumstances.

14 We've heard from counsel that essentially European
15 law is so different from the United States that it would, in
16 essence, mire this court in a complexity of decisions which it
17 could never extricate itself and assort manageably. They use
18 terms such as if this court were to exercise either diversity
19 jurisdiction, which they really have no good argument does not
20 apply because the plain language of the diversity statute
21 grants jurisdiction, or discretionary jurisdiction under
22 supplemental authorities.

23 What they say is that the exercise of any
24 jurisdiction by this court over foreign claims in this global
25 situation would nullify, frustrate, undermine or override

1 European law. I'd like to --

2 THE COURT: Let me tell you what my main concern is.
3 And that is that European law does not seem to be that
4 well-developed. And there are a number of issues that will
5 undoubtedly arise and the typical, the typical reaction in the
6 Second Circuit to that is when there's a State law that we're
7 asked to interpret or asked to pass on, where there's been no
8 real authority and it's a real serious question, we send it
9 off on certification. And we don't have that possibility
10 here.

11 And it really does trouble me that this court will
12 be basically announcing principles of general application
13 throughout Europe and having no real slate to write on. I
14 mean, we would basically be taking affidavit after affidavit
15 from foreign law experts who would only be opining based on
16 what they think the European community is going to do because
17 there's no law out there upon which to rest their decision.
18 And it just doesn't seem like a particularly -- it just
19 doesn't seem like an exercise that this court ought to jump
20 into.

21 MR. HAUSFELD: I would agree, Your Honor. Except if
22 you accept that reasoning, if there's really no law, then
23 there can't be an adequate forum. The issue --

24 THE COURT: No, no. There is an adequate forum to
25 decide these new principles. I mean, these principles that

1 need development. And the adequate forum is over there where
2 the law is, where the European community, you know, enacted
3 the treaty and set up the legal structure.

4 MR. HAUSFELD: And if I could request Your Honor's
5 indulgence --

6 THE COURT: Okay.

7 MR. HAUSFELD: -- in making a distinction between
8 process and substance.

9 There is no ambiguity with regard to the substance
10 of European competition law. There is underdevelopment in
11 terms of the process which is desired to be constructed to
12 achieve the objective, but the objective is unequivocal.

13 THE COURT: But how to achieve the objective? I
14 don't know whether you want to call it process or substantive,
15 they're two different things. You know, the objective is to
16 eliminate price fixing as far as it makes sense, I suppose.

17 That's what you would say; right?

18 MR. HAUSFELD: Yes, but I think two events have
19 occurred that assist this court in understanding how U.S.
20 litigation involving European claims in particular applying
21 European law can bridge that gap.

22 THE COURT: Okay.

23 MR. HAUSFELD: Let's look at the policy in Europe,
24 which we claim is extremely clear.

25 Every citizen has a right to compensation for harm

1 suffered as a result of an infringement of European law.
2 That's guaranteed by community law for every member state
3 throughout the entirety of the union. What the European
4 Commission, which is the chief judicial body in essence for
5 policy determination for the entirety of the union says, that
6 private right are an essential complement to public
7 enforcement and that private enforcement has to be real.
8 Rights that cannot be enforced and enforced effectively, it is
9 noted throughout Europe, are not rights at all.

10 So, what has the European community told us with
11 regard to infringements of their competition law? It says
12 that community law demands an effective system for damages,
13 but at this point in time the law within the member states is
14 underdeveloped.

15 Why is it undeveloped? Because there are situations
16 in which the victims of a cartel -- and the victims of a
17 cartel, Your Honor, are all purchasers in the market infected
18 by the cartel. Infringements of European competition law for
19 price fixing are no different than price fixing under
20 Section 1 of the Sherman Act. They are combinations of
21 enterprises or companies which manipulate and interfere with
22 the free market. Not just the market of one purchaser, but of
23 the entirety of the market. So, a price fixing cartel or
24 conspiracy impacts all purchasers in the market.

25 And what the European Commission says, and is the

1 law throughout the European Union, if you have a cartel which
2 infects a market, it impacts all purchasers in that market,
3 and you have to have an effective system which allows all
4 those purchasers in the market to retrieve what was taken from
5 them by the cartel.

6 So, what else do we see about the policy so that
7 there's no ambiguity, Your Honor, in terms of what Europe
8 seeks to achieve and what it is that they need to construct in
9 order to achieve what they seek?

10 The union has said that they must ensure in this
11 increasingly complex and interconnected world that their
12 national civil justice systems are able to effectively respond
13 to disputes which cross national boundaries. A recognition by
14 itself, Your Honor, that judicial systems in any member state
15 must reach to those transactions which may originate outside
16 their boundaries and affect their citizens within their
17 boundaries as well as citizens of other states.

18 And so, the European Commission unequivocally states
19 that, faced with global problems, we need to design truly
20 global solutions; the antithesis of having each member state
21 decide within the judicial system of that member state and
22 that member state alone the impacts of a global cartel which
23 affect not only the members of those individual member states,
24 but as well the citizens of other states on other continents.

25 So, what is it that the commission tells us at this

1 point is the policy unequivocally throughout the European
2 Union for all member states? It says: Collective redress
3 mechanisms are an absolute must. Not discretionary. Not to
4 be debated, but are a must. If you're going to devise and
5 design and construct a global solution to a global problem,
6 there has to be a collective mechanism. Individual suits by
7 individuals pursuing individual relief is insufficient.
8 Ineffective.

9 But now, Your Honor, we come to the issue that you
10 raise; what does the European Union recognize? Well, right
11 now they say the hurdles are too great. Our system is too
12 ineffective. We cannot achieve the desired unequivocal
13 unambiguous objective of providing the right to every victim
14 of an infringement of European law the compensation to which
15 it is entitled. And they are not shameful, nor are they
16 difficult in stating their objective. The primary objective
17 of European law, particularly with regard to infringements of
18 Article 81, price fixing cartels, is full compensation for all
19 damages suffered as a result of the European Commission
20 anti-trust rules.

21 And we see within the European Union an
22 understanding of the interaction of global economic force.
23 What they advocate, what they acknowledge, what they seek to
24 achieve is coherence in competition law and enforcement around
25 the globe. Not compartmentalization, not each member state

1 deciding its interpretation of an unambiguous law. Price
2 fixing is price fixing in every member state. Price fixing is
3 equally prohibited in the United States and is no different
4 than price fixing infringements in each of the member states
5 of the union.

6 THE COURT: The one, I think I know where you're
7 going with your presentation, Mr. Hausfeld. But I must tell
8 you, you quote a good deal from the white paper and you quote
9 from some individuals who are at the Commission. But that
10 announcement of the Commission or of some small group of
11 people who have goals that they would like to set for the
12 European Union and the European Commission is not a
13 commandment for this court to act. It's a commandment maybe
14 for the European community to do what it has to do to provide
15 those mechanisms.

16 But it seems to me that as far as I understand the
17 way that the European treaty works is that the, the treaty
18 announces the objectives or the law that's to be, the law that
19 should be applied and then leaves it to the member states to
20 actually provide an enforcement mechanism. And it's not for
21 the, it doesn't seem like it's for the United States to now
22 decide for each of those member states the enforcement
23 mechanism to apply.

24 And to the extent that a more robust and collective
25 mechanism is to be provided, that's a question for the

1 European community to do, not for this court.

2 MR. HAUSFELD: I take Your Honor's question as the
3 underpinning of the difficulty in making the connection
4 between European law and U.S. law and the rights of foreign
5 purchasers to seek justice in a U.S. court for violations of
6 those laws. And let me make that connection, if I can.

7 When you say the fact that Europe has an unequivocal
8 unambiguous objective which they seek to construct is -- and I
9 think I wrote this down accurately -- is not a commandment to
10 this court to act.

11 THE COURT: Or any court here, for that matter.

12 MR. HAUSFELD: That's not our position, Your Honor.

13 But it is our position that the fact that there are
14 those laws which are unequivocal and unambiguous and direct in
15 terms of the objective they seek, which coincide precisely
16 with the laws of this country, is not a reason not to act if
17 the Court otherwise has the ability to act. That's the
18 difference.

19 THE COURT: Well, the problem is, though, it's taken
20 us a hundred years to develop the antitrust law here; right?

21 And so, what you're asking is -- because they have
22 announced some similar objectives that we now import our
23 conception of how to deal with antitrust problems and you
24 know, and use that as the model for developing their law in
25 this area.

1 MR. HAUSFELD: No. And I say no to that quickly,
2 Your Honor, because what you just asked --

3 THE COURT: How can it be otherwise? What else are
4 we going to rely on?

5 I'll let you finish answering.

6 MR. HAUSFELD: I appreciate it, Your Honor, because
7 you're precisely at the critical question upon which the
8 assertion of jurisdiction essentially pivots.

9 What I tried to establish is that there is no
10 uncertainty in the substance of European law.

11 THE COURT: What about the -- let's take one aspect.
12 Let me just interrupt you for a moment.

13 MR. HAUSFELD: Yes.

14 THE COURT: The pass-through defense. Indirect
15 purchaser. What about that?

16 MR. HAUSFELD: I intend to get to all of that and
17 show you how courts in the United States have already
18 successfully dealt with each and every issue raised by the
19 defense with regard to the uncertainties of European law.

20 Because the white paper not only gave objectives for
21 policy in terms of what is an infringement, but they clearly
22 stated what the law of the European Union must be.

23 THE COURT: But not what it is.

24 MR. HAUSFELD: Excuse me?

25 THE COURT: But not what it is. The European

1 Commission is not the -- I mean, the white paper is not the
2 statement of the law; is it?

3 MR. HAUSFELD: Yes, it is. Because the flip-side
4 is: Is there precedent that says no, this is not the law.

5 THE COURT: I'm sorry, say that again?

6 MR. HAUSFELD: The flip-side.

7 THE COURT: There's no precedent to say otherwise.

8 MR. HAUSFELD: Exactly. And what the, under the
9 treaty Rowe, which formed the union and its regulations, they
10 are no longer a loose confederation of independent states with
11 respect to most purposes. There is a unity. And there's what
12 they call the Principle of Effectiveness.

13 And under the Principle of Effectiveness no member
14 state can fail to provide effective relief to any law applying
15 to the entirety of the union. So, by establishing its
16 principles, it sets forth in parameters this is the law that
17 each member state must follow.

18 THE COURT: But then if they say they need a
19 collective action, why doesn't everybody, why aren't all the
20 states providing the collective action like a class action
21 here?

22 MR. HAUSFELD: First of all, the white paper just
23 came out last week.

24 THE COURT: Well, maybe --

25 MR. HAUSFELD: Second of all, Your Honor, again if I

1 proceed, I think you will see how this all develops consistent
2 with that construction --

3 THE COURT: Okay.

4 MR. HAUSFELD: -- of an effective system within the
5 union.

6 THE COURT: I am interested in the arguments about
7 how American law jurisprudence has already developed the
8 European community law with respect to pass-through defenses
9 and indirect purchaser rights.

10 I mean, are there specific cases that have dealt
11 with that?

12 MR. HAUSFELD: Yes, if I can?

13 THE COURT: Okay.

14 MR. HAUSFELD: Under EU practice and policy, this is
15 the law at this point throughout the union; that a victim of
16 competition law infringements has to be fully compensated, not
17 treble damages, not double damages, single damages, but with
18 the right of prejudgment interest.

19 Just last Friday in the United States District Court
20 in the Northern District of California, Judge Brier entered an
21 order approving a settlement of a claim by British citizens
22 against Virgin Atlantic and British Airways for fixing the
23 prices of fuel surcharges on passenger flights from the U.K.
24 to destinations other than the U.S..

25 What was most instructive is Justice Brier had no

1 difficulty, neither did the defendant, in saying that the very
2 same conduct which violated United States law also violated
3 European law. Same set of facts.

4 What the Court did as well in that case is approve a
5 settlement that was consistent with European law. The
6 United States class of those passengers that flew Virgin
7 Atlantic and British Airways was an opt-out mechanism. The
8 European class, the U.K. class, was opt-in. So, only those
9 passengers that affirmatively opt into the class, consistent
10 with the present process in the U.K. and elsewhere throughout
11 the union, would be permitted essentially to participate.

12 That solves a lot of problems, Your Honor. It
13 solves the problems of there not being a New York law which
14 authorizes class actions as an opt-out. We're not asking for
15 an opt-out. As Judge Brier determined, an opt-in mechanism
16 was permissible and consistent with European law, and that was
17 what was ordered. It also addresses the issue of
18 enforceability because if those persons who become part of the
19 litigation are only those who opt-in and affirmatively elect
20 to be bound by a judgment, there is no question that the
21 judgment of the U.S. court will be challenged outside the
22 United States as being unenforceable.

23 Likewise --

24 THE COURT: I'm sorry, there's no question that it
25 won't be challenged?

1 MR. HAUSFELD: Yes.

2 THE COURT: Okay. Right. That's what I thought you
3 said, okay.

4 MR. HAUSFELD: And likewise, there is no difficulty
5 in there being an affront to European law because the damages
6 that were made available to the non-U.S. passengers were
7 single damages. There were no double damages asked for, no
8 treble damages asked for; just damages, consistent with
9 prevailing European law.

10 By the way, slide 17 outlines the approach that was
11 taken with regard to the British Airways/Virgin Atlantic
12 settlement and the ability of the Court to accept jurisdiction
13 and make the distinctions that we just spoke of, consistent
14 with both the application of U.S. law and EU law.

15 (The above-referred to slide was published to the
16 courtroom.)

17 Now, defendants raise the issue of indirect standing
18 and pass-on, which is also a matter of allocation. Who has
19 standing to sue what the damages in terms of the chain of
20 distribution and how do you make that allocation?

21 Well, the European Union presently has a practice
22 that says indirect purchasers should be able to rely on the
23 rebuttable presumption that the illegal overcharge was passed
24 on to them in its entirety.

25 First of all, Your Honor, an indirect purchaser

1 purchases damage or injury derivative of the direct
2 purchaser's injury. The two combined can never exceed that of
3 the impact on the market as a whole. The impact in the market
4 is a hundred percent. Usually, the first purchaser bears the
5 entirety and then it may get passed on down the chain of
6 distribution.

7 So, within the European Union indirect purchasers
8 have an equal right to at least allege an injury derived from
9 the first purchase in a market impacted or infringed by a
10 cartel. But the union specifically states, and it is the
11 preference throughout the union that issues regarding
12 allocation be determined by mechanisms such as arbitration or
13 mediation between the parties seeking the allocation from the
14 fund.

15 In other words, once the market impact is
16 determined, the defendants' rights are concluded and it's a
17 matter of, as between the direct and indirect purchasers in
18 the chain of distribution of who is entitled to that.

19 THE COURT: Let me, can I switch you off this
20 subject? I mean, it sounds like it seems to me I'm getting an
21 education in European Commission law, which sort of gets past
22 the --

23 MR. HAUSFELD: Next slide Your Honor?

24 THE COURT: Well, one of the questions that was
25 raised by the defendants was whether the claims here are going

1 to be determined by English law or not. It seems like the
2 claims are asserted under English law.

3 Are they accurate? Are they right about that?

4 MR. HAUSFELD: Claims can be asserted under English
5 law looking to see whether there was a forum, but the claims
6 are essentially asserted under EU law. Was there an
7 infringement of Article 81 prohibiting price fixing cartels?
8 That is the single law which applies uniformly throughout all
9 member states in the European Union.

10 THE COURT: But could they all be adjudicated, then,
11 in one forum?

12 MR. HAUSFELD: Absolutely.

13 THE COURT: And then, why isn't that an adequate
14 alternative forum, then?

15 MR. HAUSFELD: If I could get to that in a second?
16 I would like to give the Court the example of what occurred in
17 this litigation.

18 THE COURT: But this litigation we're talking about,
19 this isn't the context of a settlement, and that's not as
20 instructive to me as what's going to happen in a, we're not --
21 maybe we'll get a settlement. We've already got one, so it's
22 possible I suppose we'll have a settlement down the line.

23 But I guess I'm not as, the finding by Judge Brier
24 that he could approve a settlement of, I guess, it's -- you're
25 saying he's approving a settlement of EU, of EC treaty. Or

1 EU. Is it EC treaty? The EC treaty claims.

2 MR. HAUSFELD: Yes.

3 THE COURT: It is not whether this court can
4 adjudicate disputes about or should adjudicate disputes
5 involving European law.

6 MR. HAUSFELD: That's a fundamental difference and
7 I'd like to get to that in a moment.

8 After we say what happened in this court, not as an
9 indication of what would happen in Europe, but of the fact
10 that using the same mechanisms that would be available in
11 Europe, this court has already addressed the issue of pass-on
12 allocation because there was a determination by a mediator
13 with respect to the damages that different levels of
14 purchasers in the chain of distribution could and should
15 recover.

16 THE COURT: You're talking about in connection with
17 the Lufthansa settlement.

18 MR. HAUSFELD: Yes.

19 THE COURT: All right.

20 MR. HAUSFELD: But if there's a judgment,
21 Your Honor, we're going to involve, we're going to need to
22 involve the same mechanism. And that is: Can we mediate
23 that? And that's what Europe says should be done.

24 So, we're looking to see, what is it that remains
25 outstanding that this court is at least urged not to do

1 because it can't do when, in fact, other courts, both this
2 court and the Northern District of California have already
3 done.

4 THE COURT: But that's when the parties have agreed
5 to that. I mean, that's just, it's a different circumstance
6 in my mind between finding a mechanism for distributing a
7 settlement versus, you know, adjudicating all the disputes
8 that are going to occur in connection with the litigation.

9 I mean, it's a lot. As you said, we don't have to
10 worry about whether those people who opt-in are going to
11 challenge anything that's done here in a foreign jurisdiction.
12 If this case is actively litigated, which at this point I have
13 to assume it will be, this court will be asked to decide a
14 myriad number of questions of European community law, which we
15 are going to say is binding on the parties before us, but
16 which are announcing principles of application in Europe.

17 MR. HAUSFELD: Can I, again --

18 THE COURT: Let me ask you a question: Of what
19 authority is the settlement here regarding any of these issues
20 going to -- I mean, is the European Commission looking to what
21 the United States does with European community anti-trust
22 claims?

23 MR. HAUSFELD: If I can separate a difficult
24 concept? And that is, this court acting beyond its authority
25 to reach out to do something which it otherwise doesn't have

1 the authority to do.

2 THE COURT: Okay. It's not so much that.

3 MR. HAUSFELD: Okay, then.

4 THE COURT: I'm not really challenging whether the
5 Court could decide issues of foreign law. The Court can.

6 MR. HAUSFELD: Yes.

7 THE COURT: It's whether it should.

8 MR. HAUSFELD: Okay. Now, let's stop right there.
9 Whether it should.

10 First of all, under diversity jurisdiction, under
11 the plain language. And even the defendants don't make much
12 of this other than to say well, we should ignore the plain
13 language. This court has mandatory diversity jurisdiction.
14 That, in essence, puts it in the position of applying foreign
15 law to a litigation that it already has legitimate original
16 jurisdiction.

17 Now, the issue then becomes discretionary
18 jurisdiction under supplemental. But I'd like to hold off on
19 that for just a moment and get to the heart of what I believe
20 is Your Honor's concerns.

21 What would you need to decide in foreign law that
22 would be novel with respect to that foreign law? Under
23 United States law, Your Honor's going to be deciding whether
24 or not there was a global conspiracy to fix prices which
25 impacted U.S. commerce, whether that includes commerce to the

1 United States as well as from the United States. That is an
2 issue you have to decide.

3 With regard to foreign law under the treaty of Rowe,
4 you have to decide whether there was a price fixing cartel
5 which violated Article 81. The same issue. There's nothing
6 novel. Would you have to decide, as the defendant said,
7 issues of passing on? Well, technically, you wouldn't.
8 Because what you could do is decide the issues of liability
9 and then send the remaining case back to Europe, if you
10 wanted, for an allocation. But you also could decide issues
11 of allocation using the same processes that Europe prefers in
12 terms of mediation and arbitration.

13 You wouldn't be deciding an opt-out class action
14 because we're willing, as Judge Brier did, to make the
15 distinction and say okay, if that's the objection to applying
16 a uniform clear infringement violation of European law in the
17 United States, we'll have the same process. An opt-in class.
18 Only those who determine to come into this litigation to avail
19 themselves of this forum, a single forum in which their claims
20 can be litigated, doesn't violate any European principle.

21 Likewise, in adopting an opt-in process, there's no
22 issue of enforceability, of a U.S. judgment on absent class
23 members outside the United States, because there are none.
24 Only those who affirmatively opt-in to the U.S. litigation are
25 bound. Anyone who doesn't opt-in is free to do what they want

1 at any time. They're not bound by anything, nor are they
2 prohibited from filing a case elsewhere. So, that's not a
3 limitation.

4 There's no standing question because we have both
5 direct and indirect foreign purchasers here. Whatever the
6 rule is with regard to standing that is claimed not to have
7 been worked out, which we believe the European Commission has
8 made clear is an entitlement to all levels of distribution, is
9 not an issue because there are both parties present.

10 And the last thing that they raise is attorney's
11 fees in terms of contingencies. Well, if there is no opt-out
12 class, we're not going to be requesting attorney's fees which
13 would diminish the recovery to the class. We'll adopt the
14 European rule that if we prevail, the those who opt-in get
15 their full damage, and attorney's fees and expenses are added
16 on top.

17 So, I don't believe that there's any issue
18 practically that faces this court which is not manageable and
19 which is not consistent both with the application of U.S. law
20 to the U.S. class and European law to those European
21 businesses or persons who choose to opt-in to the U.S.
22 litigation.

23 THE COURT: Let's assume that the claims, in fact,
24 will proceed under -- you said they proceed under Article 81.

25 MR. HAUSFELD: Yes.

1 THE COURT: But somehow there's an English component
2 to this and I'm not sure I follow exactly what that is.

3 Is it procedural?

4 MR. HAUSFELD: Within each member state there are
5 separate nation rules for infringements.

6 THE COURT: Okay. So, you would rely on the English
7 one?

8 MR. HAUSFELD: No. At this point, Your Honor,
9 because the white paper has made it so clear that there is a
10 single overriding substantive law with regard to infringements
11 of Article 81 by price fixing cartels, that is what we rely
12 on.

13 THE COURT: So, is it your position that you could
14 assert an Article 81 claim in any court in Europe that would
15 reach all transactions touching the European Union?

16 MR. HAUSFELD: The difficulty with that statement,
17 Your Honor, is I don't know if I could get jurisdiction over
18 all of the defendants in every member state. But ideally, if
19 I could, a judgment, a judgment that there was an infringement
20 of Article 81 by numbers of companies would be applicable
21 throughout the European Union. And the example I'd like to
22 cite to Your Honor is the European Commission's statement of
23 objections.

24 That statement, which I think defense counsel opened
25 the door to in saying we could not state a claim for violation

1 of European law, is several hundred pages long. It details
2 date, time, place, persons in attendance, what was said, what
3 was not said. And --

4 THE COURT: I'm not sure I know what you're
5 referring to.

6 MR. HAUSFELD: In the European Union, the European
7 Commission, which is like our Department of Justice Anti-trust
8 Division.

9 THE COURT: Right.

10 MR. HAUSFELD: Instead of issuing an indictment,
11 issues a statement of objections.

12 THE COURT: Okay. So, as to this price fixing.

13 MR. HAUSFELD: As to this cartel.

14 THE COURT: Right.

15 MR. HAUSFELD: And they outline all of the acts
16 which constituted an infringement or violation of Article 81
17 throughout the entirety of the union by all of the companies
18 that were named in that statement of objections. That would
19 be our statement of the claim. That statement of objections
20 is binding in all member states. That statement of objections
21 states that for all members of states there was a violation of
22 Article 81 by those companies named in that statement of
23 objections.

24 So, there is a singularity to the infringement by
25 the defendant in all member states which constitutes a single

1 violation of a single law. That's what Your Honor would be
2 applying under either diversity jurisdiction or under
3 supplemental jurisdiction.

4 THE COURT: Okay.

5 MR. HAUSFELD: If Your Honor has any questions on
6 comity, I'd like to address that since regrettably it's been
7 the case that our office has been principally involved in the
8 making of some of the law on comity in the last ten years.

9 THE COURT: Let's see. No, I don't think there's
10 anything.

11 MR. HAUSFELD: Defense counsel is correct. There
12 are two aspects to comity. There's comity in terms of
13 conflict of laws and I think, as conceded by defense counsel
14 this afternoon, there is no conflict of loss.

15 THE COURT: Right. I would like you, I'm glad you
16 picked up on that. Their argument is that that's not --
17 they're not arguing under that strand.

18 They argue that there's a different strand of the
19 comity doctrine that they're relying on, and particularly
20 point to Biggio. So, yes, address that, if you will.

21 MR. HAUSFELD: So, there is no conflict of law which
22 is significant because in saying there is no conflict of law,
23 Your Honor, that's an admission that there is a confluence of
24 law. Or a harmony or a convergence in the law. The law in
25 the EU, Article 81, is the same as Section 1. The conspiracy

1 to price fix in violation of Section 1 of the Sherman Act is
2 the same cartel which infringed the terms of Article 81 of the
3 European treaty. So, then we go to the concept of comity in
4 courts. Let's look at the cases which are cited by the
5 defendants.

6 The first is the Ivanova versus Ford Motor case
7 involving German forced enslaved laborers. And what the Court
8 says in relation to comity is that a U.S. court should not
9 interfere with a foreign sovereign's pronouncements of its
10 law.

11
12 (Continued on following page.)
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1 ARGUMENT IV

2 MR. HAUSFELD

3 MR. HAUSFELD: (Continuing) In the hundreds of pages
4 of arguments that have been made by defendants in writing and
5 of the time expended this afternoon by the defendants, they
6 have not identified one pronouncement of EU Law that would be
7 interfered with by a decision by this court; that the price
8 fixing cartel engaged in by these defendants was not equally a
9 violation of Section 1 as well as Article 81 of The European
10 Code.

11 The second aspect of comity, of course, was
12 whether or not a decision by a U.S. court would disrupt a
13 foreign procedure in place for the resolution of the claims
14 being sought to be litigated in a U.S. court. That's very
15 significant, because we just heard Mr. Ogden say that there is
16 no litigation right now in place in Europe, so there could be
17 no disruption of any foreign procedures.

18 There is no present case on file in Europe
19 which this court would disrupt and there is no foreign
20 pronouncement of law that would be interfered with. And this
21 court, in terms of what the Second Circuit has said, almost
22 using the identical words issued by the European Union that
23 "Federal courts should expect with increasing frequency to
24 apply foreign law as global economies expand and cross border
25 transactions increase."

Argument IV - Mr. Warnot

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1 THE COURT: I'm going to have to ask you to wrap it
2 up, Mr. Hausfeld.

3 MR. HAUSFELD: Actually that was --

4 THE COURT: That wrapped it up.

5 MR. HAUSFELD: That was my wrap up, Your Honor.

6 THE COURT: I'm going to let either Mr. Ogden or
7 Mr. Warnot react to this to the impact of the opt-in opt-out
8 issue. The opt-in opt-out option, let's call it that.

9 ARGUMENT IV

10 BY MR. WARNOT

11 MR. WARNOT: I will make just a couple of points
12 from here if that's okay, Your Honor?

13 THE COURT: Okay.

14 MR. WARNOT: First of all, the White Paper is not
15 European Law. It's no more European Law than the report of
16 the Anti trust Modernization Committee is U.S. Law. If you
17 look at Mr. Basedow's affidavit, it specifies the various
18 sources of European Law and the White Paper certainly isn't
19 one of them.

20 THE COURT: Could you give me your take of what the
21 interrelationship is between the European Commission and the
22 various member states in terms of announcing law and in terms
23 of, you know, what can and cannot the EC do in terms of
24 requiring member states to quote, "Provide an effective
25 remedy."

Argument IV - Mr. Warnot

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1 MR. WARNOT: Well, The European Court of Justice has
2 said that, "The member states must provide," they must enforce
3 Article 81. What can be done at the Commission level is to
4 legislate; and once the Commission legislates, that's binding
5 on the member states. Opinions and recommendations are not
6 binding on the member states.

7 THE COURT: Okay. It's a legislative body as well.

8 MR. WARNOT: Not the Commission, the community as a
9 whole. There is a legislature. The Commission is more like
10 the Executive. Then, the member states have to effectuate
11 regulations when they're enacted into law and if there is a
12 dispute as to whether, in fact, it's being done right you go
13 up to The European Court of Justice. Any European court,
14 whether it's an appellate court or trial court, has the option
15 to seek an opinion from The European Court of Justice.

16 THE COURT: You mean any member state's court?

17 MR. WARNOT: Yes. The way that the law will be
18 developed in the European Law is the way the law gets
19 developed here. You have cases; the cases go up on appeal
20 where necessary. You go to The European Court of Justice to
21 get opinions on various points of law. With the way to make
22 sure the law stays completely undeveloped is to give European
23 plaintiffs a forum in the U.S. where they can have a jury
24 trial and contingency fees and broad discovery, all the things
25 that go along with litigation and why would they stay in

1 Europe if they can just come here. Of course, that's not what
2 the U.S. judicial system is about.

3 The excerpt that Mr. Hausfeld showed you from
4 the Virgin stipulation neglected to include the various
5 language that's in the following paragraph of that
6 stipulation.

7 "Notwithstanding the stipulation contained in
8 Paragraph 4, which refers to above, both plaintiffs and Virgin
9 Atlantic agree that such stipulation is not a concession that
10 this court or any court in the United States has jurisdiction
11 over claims arising under the laws of any nation or
12 jurisdiction other than the United States."

13 That's Exhibit 7 of the plaintiff's brief.

14 Let me make just a couple of other points.

15 The test on comity according to Bigio whether
16 it would effect amicable working relationships with another
17 sovereign. We haven't admitted there is no conflict.

18 As Your Honor rightly pointed out, the point
19 that we made that's not the question in the application of the
20 comity analysis in the Iguanowa case. The issue there was
21 interfering with pronouncements of a foreign sovereign. Well,
22 here we have lots of pronouncements from the European
23 Commission as set forth in our papers as to what they're
24 trying to do to develop private rights of action for
25 Competition Law in the European community and we've set forth

1 in our papers all the ways that this court, taking
2 jurisdiction over this case, would interfere with that and I
3 think those are the only points I can make.

4 THE COURT: All right. Mr. Ogden.

5 ARGUMENT IV

6 MR. OGDEN

7 MR. OGDEN: Couple of things, Your Honor.

8 First, a little bit more about the interplay
9 because I think it really is very important between European
10 Law and National Law and how that functions.

11 European Law and Article 81 provides the
12 question as to whether there was a violation of substantive
13 law. But all of the other laws that relate to civil damages
14 recovery is to be supplied by National Law.

15 THE COURT: Including -- one thing that occurred to
16 me what about sufficiency evidence to establish.

17 MR. OGDEN: Exactly.

18 THE COURT: Is that something that would be
19 relegated to the member states?

20 MR. OGDEN: Yes. So that the standard of proof, for
21 example, in different states in Europe includes a probability
22 standard, high degree of probability standard, beyond a
23 reasonable doubt standard, there are a variety of them. And
24 on the face of it, that question would be entrusted to the
25 national courts to develop and apply their rules. They're

1 obligated to have an equivalency.

2 There, is in addition to the effectiveness
3 principle, there is an equivalency principle. So, there is an
4 obligation for the national state to record to European laws
5 an equivalent rule to the one they apply to cognate similar
6 kinds of laws. So that procedure is applied that is in turn
7 subject to this requirement of effectiveness.

8 So, presumptively National Law on fault,
9 statute of limitations, damages; what categories of damages
10 are available, the standard of proof as we just discussed,
11 issues of standing like indirect purchaser standing, the
12 availability of a pass-on defense, a causation standard as to
13 whether it's direct or but for, et cetera. Attorneys fees.
14 All of those are presumptively subject to National Law
15 enforcement.

16 Now, there is an appeal which a plaintiff can
17 take if a plaintiff doesn't think that the remedy provided by
18 National Law or the procedure or the subsidiary set of rules
19 which obviously are some of them substantive, some of them
20 procedural. If they don't afford an effective remedy, they
21 can take that question to The European Court of Justice. Any
22 national court, the trial level court, the lowest court to the
23 highest court, can send a question of European Law to The
24 European Court of Justice.

25 THE COURT: The Court can as well as the litigants?

1 MR. OGDEN: The court may send it at the lower
2 level; the litigants could certainly request that. When the
3 litigants appeal to the highest court, there is a mandatory
4 referral to The European Court of Justice to decide issues of
5 European Law and it's in the context of that type of appeal
6 like you get the Courage v. Crayhan case where The European
7 Court of Justice said that the British law which disabled a
8 person who entered into an illegal agreement from suing about
9 its violating antitrust law had to be set aside because it
10 denied an effective legal remedy. There is a subvening
11 federal, if you will, obligation that the ECJ enforces that
12 remedies be effective. But subject to that, National Law
13 supplies the rule.

14 THE COURT: You said something about comparable.

15 MR. OGDEN: There is a Rule of Equivalency which is
16 the other principle that's talked about in the affidavits, the
17 expert affidavits, that Your Honor has many pages of which
18 talks about the requirement.

19 England can't provide a less generous rule to a
20 plaintiff suing under EU Law than it provides to a plaintiff
21 suing under English Competition Law, that's the Rule of
22 Equivalency. Then, there's the Rule of Effectiveness that
23 says, "Even if you give the equivalent rule, it has to be
24 effective," and it's that mandate that the European courts,
25 The European Court of Justice, will be working out in the

1 context of suggestions of the White Paper; and in the context
2 of policy arguments, get made by the European Commission. The
3 courts are going to implement this and this is mandate of
4 effectiveness.

5 I did also want to observe it is true there are
6 no cases presently in European courts; that's because the
7 European Commission currently has under consideration this
8 very matter. It's deciding whether it's going to adjudicate a
9 violation and once it does that, Your Honor, that will trigger
10 the right to file lawsuits in national courts and if there is
11 a determination of a violation that --

12 THE COURT: You've lost me a little bit. What's the
13 issue that's under consideration?

14 MR. OGDEN: The European Commission is not just
15 anti-trust division, it actually adjudicates violations of law,
16 and it currently has under consideration a Statement of
17 Objections against these defendants, many of these same
18 defendants, in which it's going to determine whether Article
19 81 was violated.

20 THE COURT: Okay.

21 MR. OGDEN: When it makes that determination, that
22 determination will be binding on all European courts; and at
23 that point, civil damages actions can be brought that will be
24 based on that determination by the EC that there's a
25 violation.

1 Mr. Hausfeld has suggested one possible way to
2 go. There would be for this court to just adjudicate a
3 violation of Article 81 and leave the damages to the National
4 Courts of Europe but that's exactly what the European
5 Commission is doing right now. There is no need for this
6 court to adjudicate these issues to create a determination of
7 a violation of Article 81 because the European Commission,
8 believe it or not, actually is proceeding to enforce European
9 Law at the present time which will trigger that exact process
10 without this court's assistance.

11 THE COURT: Okay.

12 MR. OGDEN: So, for all of these reasons, Your
13 Honor, we think that this court should let a right of
14 effectiveness that Mr. Hausfeld has so accurately described be
15 enforced by European courts. We think they're fully capable
16 of doing so and there is no reason this court should continue
17 to entertain this action.

18 MR. HAUSFELD: May I Your Honor.

19 ARGUMENT IV

20 BY MR. HAUSFELD

21 THE COURT: Okay, one minute.

22 MR. HAUSFELD: I will try.

23 They're correct that the European member states
24 must enforce Article 81. There is no question, and Article 81
25 is simple: Was there a price-fixing cartel which infringed

1 that article. Same issue as is here substantively identical.
2 They're somewhat incorrect or it's interesting with regard to
3 the Statement of Objections. The Statement of Objections is
4 greater than an indictment in the eight years that the
5 commission has issued Statement of Objections. Less than one
6 percent of those Statement of Objections has that statement
7 not been reduced to a final judgment and in essence equivalent
8 to an indictment of the defendants.

9 So, the sufficiency of the evidence and the
10 causation with respect to the fact of infringement is
11 literally already established. But, we can live with no jury
12 in the United States as well if that's what they're concerned
13 about as opposed to what it is that they're really seeking,
14 because what they are saying is this court may take
15 jurisdiction or has jurisdiction under diversity and may take
16 jurisdiction under comity but it should leave foreign law to
17 development in foreign nations, while, at this very time, they
18 concede there is no forum which would effectively redress the
19 damage which has been caused by the cartel which caused an
20 infringement of Article 81 as well as Section 1 of the Sherman
21 Act. What they seek is not the best forum, what they seek
22 really at this time is no forum.

23 THE COURT: I don't follow that. If the Statement
24 of Objections is binding on all the member states, then the
25 member states now have to afford a remedy for those

1 violations, right?

2 MR. HAUSFELD: That's what would follow logically,
3 and the issue becomes, you know, when you form a more perfect
4 union sometimes it takes some time in order to get to that
5 formation to get that formation into the most effective system
6 that harmonizes the entirety of what's been combined.

7 THE COURT: Okay.

8 MR. HAUSFELD: At the present time, that
9 harmonization doesn't exist but the law, the substantive law,
10 does and the processes that we have put forth to the Court,
11 the no contingency --

12 THE COURT: Wouldn't this court be required to try
13 to figure out what the member states are going to do with that
14 -- to provide the remedy. They're the ones that have to
15 decide the remedy, don't they? And we are bound by their law
16 as to remedy.

17 MR. HAUSFELD: No.

18 THE COURT: Why not.

19 MR. HAUSFELD: Because the remedy that we have
20 suggested is the remedy that would be in place now if the
21 cases were brought.

22 THE COURT: I'm just not following that.

23 I thought that the remedy was up to the member
24 states; and, of course, the member states have to make sure
25 that is an effective remedy and the member states have to make

1 sure it's an equivalent remedy. But the member states have
2 different remedies, it seems to me, at least there's a
3 possibility.

4 I'm going to have to educate myself or Judge
5 Gleeson as to what all the member United States would do with
6 that state of objections, right?

7 MR. HAUSFELD: No.

8 THE COURT: Why not? Aren't we bound to if, sitting
9 in diversity, which is that's the analogy I'm drawing.

10 MR. HAUSFELD: Yes.

11 THE COURT: I have to apply the law of the state
12 that -- well, first, I got to make a Choice of Law Analysis
13 and then the Choice of Law Analysis, it seems to me, would
14 inevitably lead to foreign states, wouldn't it, and then I
15 have to apply their law.

16 MR. HAUSFELD: There is a difference, Your Honor,
17 again in terms of building or a highway under construction and
18 the building or highway having no design.

19 THE COURT: Your metaphor is a good one but I'm not
20 sure I am following you.

21 MR. HAUSFELD: Let me try it this way.

22 If you take the principle of effectiveness and
23 take the acknowledgement that Article 81 is mandatory, what
24 we're left with in Europe at the present time is they know the
25 procedures that have to be put in place. It's a matter of

1 time for them to be enacted or put in place.

2 In the interim, this court has jurisdiction and
3 what we're asking this court in terms of the construction is
4 to apply those remedies which are available should be
5 available in every jurisdiction which are just waiting
6 implementation.

7 THE COURT: Okay, I think I get the argument.

8 Let's take about ten minutes, folks. See you
9 then.

10 (Recess taken.)

11 (Judge VIKTOR V. POHORELSKY takes the bench.)

12 THE COURT: Is everybody back? Did I come in early?

13 MR. ARENSON: I think it's a different group over
14 there.

15 THE COURT: Oh, I see. Some people left.

16 MR. SHERMAN: We just moved.

17 THE COURT: Are there more bells and whistles? Are
18 there going to be more things posted?

19 All right?

20 Well, then let's move to the next issue here
21 which is the Foreign Sovereign Immunities Act issues. And
22 there was a question about who was going to argue on behalf --
23 well, not who, but in what order I suppose.

24 Has that been moved out with respect to the
25 arguments?

Argument V - Mr. Blanch

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1 ARGUMENT V

2 BY MR. BLANCH

3 MR. BLANCH: Ryan Blanch representing Saudi Arabian
4 Airlines.

5 Did we allocate the time per attorney but the
6 other three counsel, the FSIA defendants, would like to be
7 heard as well but I think we can avoid any redundancy of
8 argument.

9 THE COURT: Yes, I would like to avoid that. So
10 there are four in total who want to argue.

11 MR. SPECKS: There are four defendants and I will be
12 speaking on behalf of the claims.

13 THE COURT: Then I still have a couple of other more
14 limited issues, I guess. So, you didn't know how much total
15 time I was going to permit.

16 MR. BLANCH: We plan on staying inside of the total
17 time parameters.

18 THE COURT: Well, let's start. There are slightly
19 different issues.

20 MR. SPECKS: I would like half the time.

21 THE COURT: I would like to limit the movant to
22 about 30 minutes and then 15 minutes to the defendants if
23 they're prepared. I mean the plaintiffs.

24 Why don't you get started Mr. Blanch and we can
25 sort it out.

1 MR. BLANCH: I represent Saudi Arabian Airlines. I
2 think if we get right to it, I think the problem that what I
3 would characterize as plaintiff's overbroad complaint creates
4 as to all defendants when we discuss Twombly and notice
5 issues. I think all of those problems are really magnified
6 when that same plaintiff purports to wrap in a foreign
7 sovereign into its grasp.

8 The Foreign Sovereign Immunity Act is pretty
9 specific and pretty rigorous and it definitely prohibits
10 allowing plaintiffs to cast this loosely woven net that's
11 industry wide and seeks to bring in every airlines.

12 Under the Direct Effects Test as well as
13 plaintiffs' argument with respect to the waiver, they just
14 can't meet the hurdles that are required using the same
15 complaint and what I think as a procedural matter. If it is
16 procedural, I think that plaintiffs have really had their
17 opportunity here to overcome their burden to show that there
18 is a commercial activity exception or other exception that
19 applies to the foreign sovereign immunity status that we have
20 asserted. I think plaintiffs have not contested that we are,
21 in fact, a foreign sovereign.

22 THE COURT: Except as to one I think it's South
23 Africa, there is a real contested --

24 MR. ARENSON: Yes.

25 THE COURT: But as to Saudi Arabia you're Saudi

1 Arabi a.

2 MR. BLANCH: As to Saudi Arabi a, I think it's
3 conceded. The important note is the plaintiffs have a burden
4 of providing evidence to show that an exception applies and it
5 failed to do this, there is absolutely no evidence provided
6 whatsoever.

7 The closest they came to providing evidence was
8 to provide the waiver. The waiver, however, is not really
9 evidence of anything other than a waiver exists and that
10 waiver itself is need to be narrowly construed and has
11 parameters as to what it waives, it's a blanket waiver as
12 to any lawsuit.

13 THE COURT: Let me jump back to the pleadings. At
14 least in their argument they assert various facts that would
15 suggest that the commercial activity exception would apply.
16 And, if those facts were pleaded, then if the facts that they
17 state in their papers were pleaded, would you concede that
18 that would establish the commercial activity exception.

19 MR. BLANCH: If I understand the question, Your
20 Honor, you said that you --

21 THE COURT: Let me see if maybe I'm not framing your
22 argument properly.

23 My understanding that the thrust of the attack
24 on the pleadings as they now are framed with respect to the
25 foreign instrumentalities is that they do not plead with

1 enough specificity the jurisdictional basis for getting
2 jurisdiction under the foreign sovereign immunities act they
3 don't plead enough facts.

4 MR. BLANCH: That's correct.

5 THE COURT: But they do try to supply some facts in
6 their argument they're not pleading but they supply some facts
7 about the activities of the various defendants in terms of the
8 air transport services they supply.

9 My question really is that they were given the
10 opportunity to plead those facts wouldn't that get them over
11 the hump in terms of establishing the commercial activity
12 exception.

13 MR. BLANCH: I would have two responses and they
14 both result in the same answer which is no. The first issue
15 is, you know, have they adequately pleaded those facts
16 specifically enough in order to show an exception. The answer
17 to that is no, and if they were to replead those, if they
18 already have the opportunity, they certainly could have
19 submitted a complaint. But even if they were able to
20 specifically allege the kind of acts that would give rise to,
21 arguably, the commercial activity exception they are required
22 to come forward with actual evidence to show that and they
23 have not come forward with any evidence.

24 THE COURT: They have to come forward with evidence
25 at some point, obviously. But in terms of establishing

1 jurisdiction, at the outset, the Court doesn't usually have an
2 evidentiary hearing. They permit the Court, unless there's a
3 real question as to it on the face of the pleadings as to the
4 legitimacy of the facts, I guess. But if they plead the
5 facts, the Court is supposed to accord those facts, you know,
6 all reasonable inferences in their favor, right?

7 MR. BLANCH: I respectfully disagree with that.
8 However I would like to back up and restate that even if they
9 were to plead those facts specifically. That hasn't been done
10 and that is not where we are.

11 THE COURT: I understand that.

12 MR. BLANCH: However, every court, I believe it's
13 every court, I can't provide citations, but somewhere in the
14 brief it says that the once we assert that we are a foreign
15 sovereign, the plaintiffs have the burden to provide evidence
16 and that every court uses evidence; and now I'm not talking
17 about having a complete trial or an evidentiary hearing on the
18 matter, but I think that has been done before as well as at an
19 evidentiary hearing but some scintilla of evidence to put us
20 on notice and show us what they're talking about.

21 THE COURT: What do you mean? What do you mean by
22 evidence? You mean affidavits?

23 MR. BLANCH: Perhaps an evidence, for example, we
24 submitted an affidavit because we're required to put forth
25 some evidence that we are a foreign sovereign is a conclusory

1 statement that we're a foreign sovereign, we have to sort of
2 show it. It's a little easier to do, I suppose, than show a
3 commercial activity exception but it wouldn't be that
4 difficult.

5 In other words, all of the evidence that is
6 required to show us a bill, show us an invoice, show us one
7 plaintiff that was directly harmed by direct and immediate
8 impact by commercial activity that took place outside the
9 United States that gives rise to the claim and has a direct
10 impact, we're not.

11 Regardless of whether the claim is sufficient
12 as to all the other defendants, we contest that it is not but
13 we're not in the same boat as the other defendants and it
14 wouldn't be too onerous or too difficult to provide by way of
15 an attachment some evidence to saying here's John Doe, he
16 purchased this; here's the inflation amount; here's where the
17 conspiracy occurred. Here's what Saudi Arabian Airlines
18 conspired with, and here's what the claim is about or
19 otherwise you just have this sweeping, conclusory, broad
20 complaint that's meant to apply to all defendants but clearly
21 does not.

22 One of the examples that came up, and I think
23 it was discussed today. In the complaint, plaintiffs broadly
24 allege as to all defendants that meetings took place at the
25 highest level. Well, with respect to Saudi Arabian Airlines's

1 organizational chart, that means that they would be alleging
2 that King Abdullah who was at the of the organizational chart
3 was conspiring with all 30 airlines. I don't think they meant
4 to say that it was that broadly sweeping.

5 THE COURT: Nairobi is not that far away.

6 MR. BLANCH: Sorry.

7 THE COURT: Never mind:

8 MR. SPECKS: Also the Oil Cartel.

9 THE COURT: I'm sorry, I shouldn't have interrupted.
10 I understand the gist of that argument.

11 Move to the waiver issue, if you would, because
12 that seems to be an even stronger argument why there's
13 jurisdiction here.

14 MR. BLANCH: Okay.

15 I would argue it's not, Your Honor, because
16 again these are difficult arguments to make with respect to
17 the waiver and the Direct Effects Test because both of them
18 require us to look back at the complaint and say, "Is the
19 waiver meant to waive this kind of lawsuit?"

20 And when the complaint was that amorphous and
21 that broad and that occurred in the world and we don't know
22 what plaintiffs even apply to us, it's difficult to say the
23 complaint becomes a moving target at that point but
24 generally -- not generally -- always waivers. The case law is
25 strictly construed or narrowly construed.

1 The Court in Worldwide uses the language that a
2 waiver must be clear, complete, unambiguous and unmistakable
3 in terms of what it is actually waiving. So, if we look at
4 the language of the waiver, it talks about waiving. I'm not
5 going to read it to the Court, I assume the Court is very
6 familiar with it, but waiving claims arising from air
7 transport.

8 Well, this case is not about air transport,
9 this case is about price fixing or the setting of a price for
10 air cargo space regardless of where the destination is.
11 Plaintiffs cite some argument about where we fly to and from,
12 where Saudi Arabia has offices. That also sounds like they're
13 confusing the issues with something broader that would apply
14 to something more like a minimum contacts analysis for
15 personal jurisdiction.

16 For this, they have to show it doesn't matter
17 where we fly, what's relevant is the commercial activity which
18 is creation of contracts, we don't know if contracts exist and
19 the price setting which they allege was a result of price
20 fixing which resulted in an increase at least on surcharges.

21 So, if I can encapsulate what I'm saying
22 here --

23 THE COURT: How is that not related to air
24 transportation? I don't understand shall the distinction
25 you're making here.

1 MR. BLANCH: The distance is based on the language
2 of the waiver.

3 THE COURT: The waiver is, and I don't have the
4 language of it, but it's a standard waiver clause that's part
5 of the authorization process, right?

6 Am I right about that?

7 So, it's a standard clause that applies to
8 everybody as I recall.

9 MR. BLANCH: That's true. The waiver essentially
10 becomes a contract and the waiver has to be analyzed and clear
11 on its face just as a contract would be and, in fact, the
12 courts go a step further and say it's got to be narrowly
13 construed and really clear as what's being waived when you
14 read the language of the waiver. It sounds like it's waiving
15 anticipated lawsuits deriving from running a air transport
16 service which is when the goods arrive, the goods were broken,
17 the plane crashes, those all sorts of things go to air
18 transport. In fact, plaintiff cites cases that all talk about
19 plane crashes.

20 THE COURT: Okay.

21 MR. BLANCH: Here we have the setting of prices for
22 cargo space and I would make the analogy that is akin to a
23 broker, for example, that simply sells the space regardless of
24 where that airplane is going, the broker is washing his hands
25 of the transaction once the space is sold.

1 The mere fact that the airline also handles the
2 shipping themselves doesn't mean it gives rise to plaintiff's
3 claim it simply doesn't.

4 THE COURT: Okay. Have you completed your
5 presentation, Mr. Blanch?

6 MR. BLANCH: If I may have 30 seconds to make sure I
7 didn't get too thrown off.

8 I want to conclude with one more point Your
9 Honor mentioned earlier.

10 I believe it was during the Twombly argument
11 that it looks like from this complaint that you're just
12 plaintiffs were just sort of lumping all the other defendants
13 in and that's exactly what is happening with respect to the
14 complaint as to all defendants but it's even more so the case
15 with a foreign sovereign.

16 You simply can't lump us in, you have to come
17 forward with evidence. You have to single us out and say,
18 well, why are we in this specifically, not that generally,
19 there was a global conspiracy at the highest level because for
20 us I don't think it was King Fahd.

21 THE COURT: In a sense, it's the heightened pleading
22 placement required by the Foreign Sovereign Immunities Act.

23 MR. BLANCH: That's what it is. Was there a direct
24 effect because a direct effect of what? Which conspiracy?
25 Which meeting? Which contract? Which pricing? It's just not

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1 there, so there is no way to get very deep in the analysis on
2 the complaint unless they come forward with an actual
3 example --

4 THE COURT: Okay.

5 MR. BLANCH: -- of what the harm is.

6 THE COURT: Okay. Thank you. So Mr. Priver.

7 MR. PRIVER: It's Mr. Priver, Your Honor.

8 THE COURT: Mr. Priver.

9 ARGUMENT V

10 BY MR. PRIVER

11 MR. PRIVER: Mark Priver on behalf of Thai Airlines.

12 I want to clarify a couple of things that the
13 Court raised and also that Mr. Blanch addressed.

14 I think it is important for the court to find
15 that the sole basis of jurisdiction against these -- at least
16 three of the defendants -- about which there is no question
17 whether they qualify as a foreign state under the Foreign
18 Sovereign Immunity Act. The sole basis this is that not
19 Sherman Act, not diversity, not CAFRA it's nothing else but
20 that.

21 The sole question we're dealing with here is
22 why we should be in the case and the rest of us should be in
23 this case at all which is why, Your Honor, I believe that it's
24 more than just a heightened pleading standard. It is as if
25 you read many of these cases and I don't recall reading

1 anywhere it was just on the pleadings. But if you read
2 Philatech and some of the other cases that follow. It talks
3 about that it is the plaintiff's obligation once the defendant
4 advances evidence tending to show that it is a foreign
5 sovereign the presumption of immunity arises, and then the
6 burden shifts to the plaintiff to produce evidence and I
7 assume, as I would imagine everybody else does, that when the
8 courts use evidence, they mean evidentiary facts. They're not
9 talking about argument or pleading.

10 Now, the argument and pleading may later on or
11 could give the plaintiffs a ticket to jurisdictional
12 discovery, but we are now here on the second amended complaint
13 and they have not advanced any evidence whatsoever that tends
14 to show in the case of my client, Thai Airways, or any of the
15 other defendants, number one, that we participated in any kind
16 of conspiracy anywhere; and number two, whether that
17 conspiracy, if we did participate in it, had a direct effect
18 on the pricing of air cargo services in the United States.

19 The case under the commercial activity
20 exception focuses on the concept of the language "based upon."
21 The complaint, the action has to be based upon a commercial
22 activity and then there's three different prongs. The "based
23 upon" analysis requires the Court to consider what the
24 gravamen of the complaint is, and in this case the gravamen of
25 the complaint is not the harm which is the price, the gravamen

1 of the complaint is the unlawful conspiracy because without
2 that, there is no case.

3 So the plaintiffs have to show, in opposition
4 to these motions, in which view with evidence which they have
5 failed to do that there is a connection between a conspiracy
6 that they have yet to prove and the commercial behavior of my
7 client and these other defendants in this court, excuse me, in
8 the United States; and they have not advanced a single
9 declaration by a single member of their class that purchased
10 air transportation on any one of these carriers.

11 THE COURT: Okay. So, the evidence that you would
12 say they would have to produce is some sort of a declaration,
13 some sort of statement under oath that is to establish a set
14 of jurisdictional facts under the FSIA.

15 MR. PRIVER: At a bare minimum, they have to at
16 least show that somebody within the class purchased
17 transportation on Thai Airways because they don't get a ticket
18 to prosecute an anti trust lawsuit against us because of the
19 behavior of other alleged conspirators.

20 THE COURT: Okay.

21 MR. PRIVER: The law is clear, there needs to be a
22 connection between the alleged conspiracy and our commercial
23 activity in the United States, not somebody else's.

24 THE COURT: Understood.

25 MR. PRIVER: On the waiver issues, the waive doesn't

1 prove anything. What the waiver does is it reincorporates the
2 law of the commercial activity exception and I have it here.
3 Basically, it states, "Carrier agrees to waive sovereign
4 immunity with the qualification but only with respect to those
5 actions or proceedings that are based on the carrier's
6 operation in international air transportation; that, according
7 to the contract of carriage include points in the U.S. as a
8 point of origin, point of destination more agreed stopping
9 place, et cetera.

10 That "based on" language is the same language
11 that's used in the commercial activity exception. The based
12 upon -- on and upon are synonymous. The case law that talks
13 about construing waivers which Mr. Blanch referred to the
14 Worldwide Minerals case, 296 F.3d 1154, Page 1162. "In
15 general, explicit waivers of sovereign immunity are narrowly
16 construed in favor of the sort and are not large in general."

17 This is a quotation, actually, "Explicit
18 waivers of sovereign immunity are narrowly construed in favor
19 of the sovereign and are not enlarged beyond what the language
20 requires."

21 Sorry for going so fast.

22 So, again, the DOT -- and this is basically a
23 contract, and the case law is telling the Court that it must
24 construe the language essentially against the DOT and in favor
25 of the sovereign. So, because it seems that they use the same

1 language based, "based upon," that they use in the commercial
2 activity exception, there is the analytical framework for
3 determining whether the waiver applies is the same analytical
4 framework you would use to evaluate whether the commercial
5 activity exception applies.

6 In other words, that the gravamen of the
7 complaint, the unlawful conspiracy, resulted in super
8 competitive prices being charged by Thai Airways and the other
9 foreign sovereign air carriers here in the United States.
10 Plaintiffs would have to go on to prove that their clients,
11 some or all of them, whichever ones that did actually purchase
12 that transportation. Either from a point of origin in the
13 United States to, in my client's case, Bangkok or vice versa
14 or that they purchased the contract of carriage and none of
15 that is done. None of that is done by way of evidence and it
16 is certainly not done by way of pleading.

17 So, I would urge the Court that here today in
18 the absence of any proof that the complaint is based upon Thai
19 Airways's commercial activity or that it has waived its
20 sovereign immunity with respect to this particular action that
21 this action would be dismissed under the Foreign Sovereign
22 Immunities Act in toto.

23 THE COURT: Without leave to replead.

24 MR. PRIVER: Proof without leave to replead because
25 this is if you look at Philatech they had almost a full-blown

1 trial and pleading is not just the only issue and it's not
2 like the plaintiffs didn't know what their burden was in this
3 situation.

4 So, I would ask the Court to dismiss the case
5 in its entirety.

6 THE COURT: All right.

7 MR. PRIVER: Thank you.

8 THE COURT: Mr. Atadi ka.

9 ARGUMENT VI -A

10 BY MR. ATADI KA

11 MR. ATADI KA: Good afternoon, Your Honor.

12 I think this case can be looked at from the
13 very simplified approach and a complicated one as far as the
14 defendants who are subject to the FSIA are concerned. In a
15 simple way, Your Honor has to see whether or not the pleadings
16 that have been advanced by the plaintiffs, whether those
17 pleadings actually catch the FSIA defendants; whether they
18 are, in fact, able to obtain jurisdiction for this court to
19 determine matters affecting foreign sovereigns.

20 Now, Your Honor, my first submission that when
21 the plaintiffs began this litigation, they probably never
22 thought that there were companies or airlines that were
23 subject to -- that were not, in fact -- were owned by foreign
24 sovereigns and not subject to the general jurisdiction of this
25 court.

1 The FSIA defendants are very unique, they are
2 unique, so before you can obtain jurisdiction against an FSIA
3 defendant, you have to plead the FSIA with us an inclusive law
4 under which any foreign sovereign can be proceeded against.
5 That, when you look at the totality of the pleadings, there's
6 no way you can see that the FSIA defendants were ever in the
7 vision of the plaintiffs.

8 THE COURT: I agree.

9 MR. ATADIKA: It was only later on --

10 THE COURT: I agree.

11 MR. ATADIKA: -- that they concede in adding some
12 other people, some other company.

13 In fact, the only paper that I have here
14 applicable to my airlines is Paragraph 47 of the Amended
15 Statement of Claim and apart from that there is nothing more.
16 In fact, anybody who wants to sue an FSIA defendant must
17 realize that foreign governments are not subject to jury
18 trial; and in this case, it's actually proceeding on the basis
19 of going before a jury trial and the foreign sovereigns are
20 not subject to trial.

21 So, basically, we are saying that if you want
22 to approach this from a simple angle, there is no pleading
23 which searches and concerns specifically the FSIA defendant.

24 Based on that alone, this action should be
25 dismissed against those people, those companies, because

1 there's nothing envisaged whatsoever that deals with the
2 contemplation of this. There is nothing at all.

3 So, if you want to go into the complicated
4 aspect of the case, then you proceed beyond that and say,
5 well, what about the commercial exception, the commercial
6 activity exception; and on that, Your Honor, we submit most
7 respectfully that under the FSIA, the issue of foreign
8 commercial activity has to be legal activity because, and on
9 this point I have to refer Your Honor to the terrorist acts on
10 September 11th which we have cited in our cases and that is
11 the Second Circuit decision. It says, "The Second Circuit has
12 made it very clear that for the purposes of FSIA, a
13 commercial activity must be one in which the private person
14 can engage lawfully."

15 THE COURT: I understand this argument; I'm not
16 persuaded by it, but I understand the argument so you don't
17 need to carry on. I read it from your papers, it's not
18 persuasive to me. You are best off moving to something else.

19 MR. ATADIKA: We ask respectfully that may have to
20 reconsider it went as far as it could be to the Second
21 Circuit.

22 THE COURT: Okay.

23 MR. ATADIKA: And Your Honor I see your position on
24 that.

25 THE COURT: Yes.

1 MR. ATADI KA: Now, the evidence, Your Honor, we have
2 raised is if the airline was not properly served.

3 THE COURT: What would be required? I'm not sure I
4 understand that the service has to be some higher level
5 official and that's because and I'm not sure I follow why that
6 was required.

7 MR. ATADI KA: Your Honor, there is an -- I would
8 like to draw your attention to the FSIA provisions on this
9 because I think --

10 THE COURT: It's right out of the statute.

11 MR. ATADI KA: Your Honor, this is Section 1608 which
12 applies to service. First of all, the first way to deliver
13 service to -- delivery of a copy, by the delivery of a copy of
14 a summons and complaint in accordance with a special
15 arrangement, the service between the plaintiff and the foreign
16 state. In other words, by a prearranged procedure which has
17 already been agreed upon by the parties.

18 THE COURT: Yes.

19 MR. ATADI KA: Secondly, you can do so by delivery of
20 the Summons and Complaint to an officer of the defendant.

21 Now, in this particular case, we have provided
22 an affidavit that the person that was served was not an
23 officer of the airline. Now, the plaintiffs countered to say
24 that, well, he was an employee about the, Your Honor, FSIA is
25 the only law which applies to sovereigns and is very exclusive

1 so they got to go very closely, examine it. By the wording,
2 if they don't serve the document according to the express
3 language of the statute it will not be a proper service. Your
4 Honor, they say --

5 THE COURT: How can they properly effect service in
6 the United States?

7 MR. ATADIKA: Your Honor, we provided an affidavit
8 of a list of officers who are at the level that can be served
9 and this is an affidavit, Your Honor.

10 THE COURT: Okay.

11 MR. ATADIKA: And, Your Honor, we also said that
12 even if -- they said it was a substantial complaint but we
13 don't accept that it was a substantial complaint, Your Honor.

14 THE COURT: Okay.

15 MR. ATADIKA: Your Honor, the other argument that we
16 have advanced is that we were brought into this lawsuit in
17 February 2007. This action --

18 THE COURT: This is the statute of limitations
19 argument.

20 MR. ATADIKA: Yes, Your Honor.

21 THE COURT: Let's deal with that later. I will deal
22 with that later. We will focus on the FSIA arguments.

23 MR. ATADIKA: Your Honor, as far as the FSIA is
24 concerned, we believe that the plaintiffs have not met their
25 burden under the provisions of that act.

1 THE COURT: Thank you. Mr. Cross.

2 ARGUMENT VI -A

3 BY MR. CROSS

4 MR. CROSS: Yes, Your Honor.

5 I'm Wayne Cross from White & Case representing
6 South African Airways. We have a slightly different issue, as
7 you noted, from the other defendant under the FSIA. There has
8 been a question raised by the plaintiff as to whether or not
9 we ARE a foreign sovereign.

10 THE COURT: Let me just jump ahead of you if you
11 will permit me. There's not a factual dispute, it seems to
12 me, about whether or not at the time of service South African
13 Airways was a foreign instrumentality. In other words, there
14 was a plan in place for it to become one but that plan had not
15 reached fruition at the time that the action was brought and
16 served.

17 Am I right about that fact?

18 MR. CROSS: You are right as to one prong of
19 Section 1603(b).

20 §1603(b) has two prongs to it. One is you have
21 to be an instrumentality of a foreign sovereign by either
22 being an organ of a foreign sovereign or by being a
23 majority-owned entity, a majority of the stock being owned by
24 a foreign sovereign. There is sovereign -- there is no
25 factual dispute, that is a ministerial dispute. At the time

1 the client was filed, it had not been completed.

2 On the other hand, it's also not disputed -- at
3 least I don't think it's disputed -- that at the time in
4 February of 2007. When the complaint was filed, South African
5 Airways was an organ of South Africa, a department of the
6 Department of Public Enterprises was operating it as an
7 agency. They were directing as an agency of South Africa.

8 THE COURT: You are relying on the notion because my
9 next question was going to be why should the Court deviate
10 from the normal rule which you examine jurisdiction at the
11 time of service, at the time of the bringing of the action.

12 You're saying at the time of the bringing of
13 the action, in fact, under 1603(a) was a quote, "Organ," of
14 the South African government and is there a test for deciding
15 what's an organ.

16 MR. CROSS: There are a series of facts articulated
17 in the briefs.

18 THE COURT: Okay.

19 MR. CROSS: The test is, it's a fluid test, that is
20 to be applied liberally. It has to do with who is actually in
21 control and to what extent of the employees and the Government
22 to what extent are the activities of sovereign activities.

23 THE COURT: And you would agree you have to make a
24 prima facie showing as to that.

25 MR. CROSS: And in our initial affidavit

1 establishing foreign sovereign, attempting to establish we're
2 a foreign sovereign we lay out those factors. But also lay
3 out the underlying legislation and statements of principle
4 about why the company was being acquired.

5 So, to be clear, though, I'm not relying
6 strictly on the organ aspect of it, I believe that we were at
7 the time the client was filed as an organ of South Africa; as
8 a result of that, FSIA jurisdiction attached.

9 In addition to, that however, while you
10 articulate what you why shouldn't I follow the normal rule
11 that jurisdiction attaches at the trial --

12 THE COURT: The Court examines the jurisdiction.

13 MR. CROSS: Typically the Court is examining
14 jurisdiction under either federal question or diversity as of
15 that date, and as of that date you don't defeat diversity by
16 moving out of the state or moving into the state, but this is
17 Foreign Sovereign Immunity Jurisdiction.

18 Our papers establish, and I believe it's a
19 fact, that while there are a couple of cases including a
20 Supreme Court case that says that you measure FSIA
21 jurisdiction as of the date of the filing of the complaint.
22 There is no case that says that you do not look at the status
23 of the sovereign at the time the motion is made.

24 Each of those cases are cases the Dole case in
25 particular which is a Supreme Court case.

1 Dole against Patrick looked at a situation
2 where the entity had lost its foreign status, its sovereign
3 status, prior to the filing of the complaint and said we're
4 dealing with comity and the Supreme Court articulated, "When
5 we look at present political reality, we're dealing with
6 comity here. How do we deal with our neighbor states if an
7 entity is not a foreign sovereign at the time we have to deal
8 with that, we're not going to give it foreign sovereign
9 status."

10 In all of the cases that I have looked at in
11 post filing events where an entity becomes sovereign after the
12 fact, after the filing, have hoarded comity because burdens of
13 proof are articulated in Dole under the principles of comity
14 which are to protect foreign sovereigns to some extent subject
15 to exception to some extent from the inconvenience and burden
16 of being dragged in our courts and subject to a jury trial.

17 Those principles apply equally post filing at
18 the date of filing. The most recent example of that which is,
19 I don't know how to say this, I don't mean it do be
20 disrespectful but it's very Posnerian. Judge Posner writing
21 for the Seventh Circuit reversed a district Court case that
22 held that an entity that ceased to be sovereign post filing
23 lost its right to a nonjury trial because it was no longer a
24 sovereign.

25 Judge Posner said, "Oh, no we do view these

1 cases at the day of the filing." And nonetheless, and I will
2 read what Judge Posner says quoting from Dole. He says,
3 "Alitalia's change of status might be a good reason to do away
4 with jury trial but it is quite apart from the practical
5 concerns of preparation of predictability that we have
6 emphasized."

7 So far that is the purpose of the Foreign
8 Sovereign Immunity Act. I quote further, "To give foreign
9 states and instrumentalities from the inconvenient gesture of
10 comity from the United States does not fall out of the picture
11 when a foreign state entity is privatized."

12 All the other cases that we cited and I'm not
13 aware of a case that stands for the proposition that where you
14 got a foreign entity -- let me make one thing clear: As we
15 stand here, there is no question of fact that we are a foreign
16 sovereign. We have completed everything; all the shares are
17 owned by the South African government. So, as we stand here
18 today, we're a foreign sovereign.

19 So, the question is for you is, okay, where are
20 your links? Is that enough to deny us comity? Nothing else
21 has happened in this case and there is not one case that
22 stands for that proposition. So, if there is a question of
23 fact as to whether we should be accorded sovereign status.

24 Finally, and I won't belabor this because it's
25 in our papers.

1 There is a doctrine supported by two cases both
2 in the Second Circuit, unfortunately, that stand for the
3 proposition that there is something called a de facto
4 sovereign under the Foreign Sovereign Immunity Act which is
5 akin to what I just argued which is: If an entity status
6 changes to sovereign status post filing, there can be a
7 finding that depending on what its status is notwithstanding
8 the fact that it was not technically a sovereign at the date
9 of filing.

10 It was de facto sovereign because its
11 sovereignty was imminently inevitable. That principle was
12 articulated by Justice Harlan when he was sitting in the
13 Second Circuit on Mubarak. It was a foreign immunity case but
14 foreign sovereign immunity hadn't passed yet. The question
15 was for jurisdictional purposes: Was the State of India,
16 prior to the time it achieved full independence from the
17 British Empire, and it was clear it had not achieved full
18 independence from the British Empire, but it was clear that
19 all the steps that were necessary to be taken to accomplish
20 that had been accomplished. It was only a matter of timing
21 that Justice Harlan that binds de facto sovereign prior to the
22 filing of the complaint even though it was, in fact,
23 sovereign.

24 Judge Sweet and Judge Sweet followed that the
25 Republic of Palau because of the imminency piece of that,

1 Pal au hadn' t been finalized in the five years since removal
2 and the Second Ci rcui t said, well , the principle stands but,
3 you know, i t' s not imminent anymore so the principle doesn' t
4 apply. That also stands for the proposition that as of the
5 date of filling we were sovereign.

6 There' s kind of three legs to my argument. At
7 the end of the baseline as I said we are sovereign as we stand
8 here and the question is, you know, are you prepared absent
9 any cases that are directly to the contrary to say we' re not
10 going to accord the South African government the benefits of
11 sovereignty. Simply we were late, we concede we were late.
12 We were in the process, it just takes time to get through that
13 process.

14 If you' ll i ndulge me bri efly.

15 THE COURT: Just very bri efly.

16 MR. CROSS: I want to address one question that you
17 asked Mr. Bl anch.

18 You said i f the evidence that they put forward
19 in response to the motion were pled would that be enough? And
20 at least in the case of South Africa, my answer would be no,
21 because the evidence, at least in the case of South Africa,
22 and there are pages from the website that establish nothing
23 more than that. We have an office in Thailand for air cargo,
24 we have an office in Johannesburg for air cargo and we have
25 airpl anes to and from the United States. That' s not enough

1 evidence to establish that we engage in any contact in the
2 United States that's connected to this conspiracy or, for that
3 matter, that we even contract cargo services in the United
4 States.

5 Now, it may be that it may establish that we
6 contract for air cargo services outside the United States but
7 when you reach that step, then you have to face the effects
8 test which is conduct outside the United States under the
9 Foreign Sovereign Immunity Act under the commercial activity
10 exception which says, "Conduct outside of the United States
11 must have a direct, nontrivial substantial effect on U.S.
12 commerce."

13 It also has to be connected to the conspiracy,
14 they pled that; and B, I think I heard Mr. Tompkins say this
15 morning that they eschewed attempted establishment in response
16 to a question that you asked about the FTAIA and the effects
17 test. Whether they were arguing the effects test or whether
18 they are arguing the imports exception.

19 I think Mr. Tompkins said something like we
20 think we might be able to do that, it's a very complicated,
21 very challenging intellectual exercise and we haven't done
22 that. So, I think that, A, the only evidence one could find
23 in this record is that we may do some air cargo business off
24 shore which may come to the United States, but I think the
25 plaintiffs have eschewed attempting to remove the kind of

1 effects under the Foreign Sovereign Immunity Act to get out
2 from under the exception.

3 Thank you.

4 (Continued on the next page.)
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1 ARGUMENT VI -A (Continued)

2 BY MR. CROSS:

3 THE COURT: Okay? Can I ask one question of you?

4 Let me just ask Mr. Cross one question.

5 MR. CROSS: Sure.

6 THE COURT: . The way that would normally proceed,
7 it seems to me is, let's assume the plaintiffs, the
8 defendants, plaintiffs, plead adequate facts in the complaint
9 to establish or to suggest that they could establish the
10 jurisdictional basis for their claims. Then you, I guess,
11 could say well, we're a foreign sovereign, but they have
12 already pleaded facts to indicate they could get over that.

13 The next step would be that there would be required
14 to make some sort of evidentiary submission to support the
15 facts.

16 MR. CROSS: I believe that's right. I think the
17 standard of proof cases talk about if we're going to make a
18 motion under the Foreign Sovereign Immunities Act, then we
19 have to establish a prima facie case that we're a foreign
20 sovereign. And they have to come forward with evidence.

21 THE COURT: At that point. Since you've made the
22 motion at the point when --

23 MR. CROSS: Okay. And then we came forward with an
24 affidavit and they came forward with their web.

25 THE COURT: Thank you.

1 That's not Mr. Tompkins now, it's Mr. Specks.

2 ARGUMENT VI -B

3 BY MR. SPECKS:

4 MR. SPECKS: Good evening, Your Honor. Gary Specks
5 of Kaplan Fox on behalf of the plaintiffs.

6 If I may, the first thing I would like to address is
7 some statements that have been made by some of the SI
8 defendants to the effect that there are no facts supporting
9 our jurisdictional, our jurisdiction over the SI defendants
10 and what I regard as a misstatement of the standard on a
11 Rule 12(b)(1) motion that occurs before discovery has taken
12 place.

13 First of all, prior to discovery, a plaintiff facing
14 a jurisdictional motion which challenges the illegal
15 sufficiency of the complaint's jurisdictional allegations can
16 defeat that motion by pleading allegations that are legally
17 sufficient to make out a prima facie showing of jurisdiction,
18 or, and/or, by relying upon materials outside of the pleadings
19 that contain averments of fact, which if proven or if credited
20 by the Court, would be sufficient to establish jurisdiction.

21 Now, not only do we have allegations in the
22 complaint that establish the commercial activity exception, if
23 taken as true, we've also submitted a substantial appendix of
24 materials outside the complaint which contain averments of
25 fact, which if credited by the Court, also establish that the

1 jurisdiction over the SI defendants.

2 THE COURT: I'm troubled by I guess it does come
3 back to the Twombly issue. I don't see a single specific
4 allegation as to any, any of these four who have raised the
5 FSIA. It just talks about the defendants in a very global
6 way.

7 MR. SPECKS: Your Honor, we have very specific
8 allegations as to each of the defendants and they include the
9 SI defendants to the effect that they are engaged in
10 commercial activity in the United States and throughout the
11 world in terms of being involved in, they say, air freight
12 shipping services within the United States and throughout the
13 world, among other things.

14 I would refer Your Honor, there's -- we set forth
15 these jurisdictional allegations in our brief. It begins,
16 it's called Plaintiffs' Statement of Jurisdictional Facts. It
17 begins at page 3 of our brief and continues on page --

18 THE COURT: You know --

19 MR. SPECKS: -- page 8.

20 THE COURT: -- it would be a lot easier if you
21 pointed to the complaint.

22 MR. SPECKS: We're citing the complaint, Your Honor.

23 THE COURT: I understand. But maybe rather than --
24 direct me to the complaint as opposed to the brief.

25 MR. SPECKS: So...

1 THE COURT: I see that you do --

2 MR. SPECKS: -- allegation with respect to
3 defendant, South African Airways.

4 THE COURT: Right. So, you're talking about in the
5 early --

6 MR. SPECKS: Right. The allegations that they're
7 engaged in commercial activity. If they're engaged in
8 commercial activity within the meaning of the FSIA, the Court
9 has jurisdiction over them. It's an exception to sovereign
10 immunity.

11 There are also numerous documents.

12 THE COURT: You're saying by virtue of say, let me
13 look at page --

14 MR. SPECKS: Just as an example.

15 THE COURT: Where is it? Where you had defined the
16 defendant parties. And I'm looking for one of these four
17 here.

18 Yes, at 47. Paragraph 47. The assertion is that:
19 "Defendant Ethiopian Airlines Corp. is a foreign company
20 located in Bole International Airport, Addis Ababa. Ethiopian
21 conducts air freight shipping services throughout the world
22 including the U.S. and this district".

23 And that's what you're saying satisfies the
24 jurisdiction?

25 MR. SPECKS: No, Your Honor, that's a single

1 allegation among many allegations in many documents that are
2 attached in an appendix to our brief where we also attach
3 registrations showing that they're doing business in the
4 United States, that they have offices in the United States,
5 that they are shipping air freight into and out of cities in
6 the United States, all of which go to the commercial
7 activities exception and bear on whether or not they are
8 entitled to sovereign immunity in this case.

9 THE COURT: So, just you would point me to the
10 appendix to your brief, and that is -- you don't have to do it
11 right now.

12 MR. SPECKS: Okay.

13 THE COURT: But you would say that the appendix,
14 coupled with the assertions in the complaint, satisfy your
15 evidentiary showing, the evidentiary showing that's necessary
16 under the test that the defendants advance.

17 MR. SPECKS: Your Honor, prior to discovery a
18 standard on a Rule 12(b)(1) motion is that you are not
19 required to make a -- when you say evidentiary showing, in
20 terms of actually submitting admissible evidence -- because
21 we've had no discovery, we've had no opportunity to discover
22 any of the facts.

23 THE COURT: All I'm asking you is, is that -- I
24 mean, there is some language in the cases that says that there
25 has to be an evidentiary showing, a showing of evidence.

1 And I'm only asking you if what you're saying is
2 that the evidentiary showing in the it appendix and in the
3 pleadings is sufficient to satisfy that burden? That's all
4 I'm asking.

5 MR. SPECKS: Yes. The complaint allegations, which
6 must be taken as truth at this juncture --

7 THE COURT: Right.

8 MR. SPECKS: -- in addition to the evidentiary
9 materials that are in the appendix, which we summarize in our
10 brief --

11 THE COURT: Okay.

12 MR. SPECKS: -- as jurisdictional statement of
13 facts.

14 THE COURT: All right.

15 MR. SPECKS: So, I do take issue with what
16 defendants are saying the standard is and the idea that we
17 haven't submitted any quote, "facts" on the issue.

18 THE COURT: Okay.

19 MR. SPECKS: That's my first point.

20 My second point, on the waiver. I don't think the
21 waiver could be much clearer than it is, Your Honor. I mean,
22 it says it: "Applies in any actions or proceedings brought
23 against these defendants in courts of the U.S. that are based
24 on their operations and international air transportation that,
25 according to the contract of carriage, includes any point in

1 the U. S. as a point of origin, point of destination or agreed
2 stopping place".

3 This is a condition that the Department of
4 Transportation imposes on these foreign air carriers as a
5 condition to them flying into and out of the United States.

6 THE COURT: And does the appendix cite to such
7 operations?

8 MR. SPECKS: Yes.

9 THE COURT: Okay. That there's, in other words,
10 identified contracts of carriage where, with some point in the
11 United States.

12 MR. SPECKS: Absolutely.

13 THE COURT: Okay.

14 MR. SPECKS: And frankly, I'm, I mean, you might
15 want to ask the defendants why, how they can come in here and
16 claim sovereign immunity when they have in their possession
17 explicit waivers of that sovereign immunity. I was kind of
18 shocked, frankly.

19 Thai Airways. We now have a new heightened pleading
20 standard being proposed by Thai Airways. Even the Supreme
21 Court in Twombly said that there are no heightened pleading
22 standards except as provided in the Federal Rules of Civil
23 Procedure, and if you want to impose one, you have to amend
24 the Federal rules.

25 There are no heightened pleading standards simply

1 because --

2 THE COURT: That was my language.

3 MR. SPECKS: Right.

4 THE COURT: I think that what they're taking from
5 the FSIA cases is that there is a requirement that there be
6 sufficient pleadings, sufficient statements in the pleadings
7 to establish subject matter jurisdiction. I'm not sure if
8 that's accurate. I thought that's what they were saying.

9 What about, does the waiver of sovereign immunity
10 mean that they have, they haven't waived a right to a jury --
11 I mean, their right not to have a jury trial?

12 MR. SPECKS: Absolutely they have, Your Honor. If
13 they're not a foreign state, if they waive their sovereign
14 immunity, they are subject to our demand for a jury trial.

15 If they are a foreign state, and they may be subject
16 to some other exception to immunity, but they would still be
17 entitled to a nonjury trial in that case.

18 THE COURT: I'm sorry, say that again.

19 MR. SPECKS: All right.

20 There's one defendant. South African Airways.
21 There is a real issue as to whether or not they are a foreign
22 state.

23 THE COURT: All right. The others are foreign
24 states.

25 MR. SPECKS: That is significant because if they are

1 not a foreign state, then they are subject to being tried
2 before a jury. Otherwise, they would not be.

3 THE COURT: Okay. That's what I'm saying. So, the
4 others have retained the right not to be tried by a jury.

5 MR. SPECKS: Right. But that doesn't mean they're
6 immune.

7 THE COURT: Understood. They come into this court,
8 but they're still required to answer the claims. They just
9 retain a right not to have those decided by a jury. Okay.

10 Now, talk about South Africa and their acquired
11 status. Well, both arguments; the organ argument and then --

12 MR. SPECKS: Counsel for South African Airlines said
13 well, there's no case standing preventing Your Honor from
14 considering these post-filing developments in the South
15 Africa's status in determining whether or not they're a
16 foreign state.

17 Well, there's only one case, Your Honor. It's
18 called the Patrickson case and it was decided by the
19 U.S. Supreme Court. And what it says is that you determine
20 the foreign state status of an entity at the time of filing.
21 Period. End of story. That's the holding of the case.

22 THE COURT: Patrickson?

23 MR. SPECKS: Yes. Dole, I believe.

24 THE COURT: Dole, yes.

25 MR. SPECKS: Dole Foods.

1 THE COURT: Yes, that's the way I know it.

2 MR. SPECKS: Now, after realize that the Patrickson
3 case destroyed their theory that just because an intermediate
4 subsidiary owned stock in South African Airways, once they
5 realize that under Patrickson that wasn't enough to give them
6 sovereign immunity or foreign state status, they started
7 arguing that they're somehow an organ of a foreign state as of
8 the date of the that the complaint was filed.

9 But there isn't any showing, there isn't any factual
10 showing of any of the factors that are required to show that
11 South African Airways was an organ of a foreign state. The
12 only, the only thing they point to, they say in June of 2006,
13 that South African Airways began reporting to the Department
14 of Public Enterprises. However, at that point in time, their
15 stock was still owned by an intermediate subsidiary.

16 Now that factor alone, I'm sorry, does not establish
17 their status as an organ of a foreign state. They have the
18 burden on that. It is their burden to show that by a
19 preponderance of the evidence. And they have not done so.
20 They don't even address any of the factors under the case law
21 that you're supposed to look at.

22 So, I would suggest, Your Honor, that --

23 THE COURT: Their submission on that issue, you say,
24 does not touch on any of the issues that the Court should look
25 at.

1 MR. SPECKS: The only possible point they make in
2 any of their submissions that could bear on that is they point
3 out that in June of 2006, they claim that South African
4 Airways began reporting to the Department of Public
5 Enterprises of the Republic of South Africa. Okay? But there
6 are numerous other factors that the courts consider and weigh
7 in determining whether or not an entity is an organ of a
8 foreign state. And none of those are addressed. So, the fact
9 that they raise that one point can't in itself establish their
10 status as a foreign state.

11 To the extent Your Honor is inclined not to accept
12 our position or is inclined to accept their position that
13 they've made some kind of a prima facie showing or proven that
14 they are an organ of a foreign state, we would request
15 discovery on that issue because it is very much a factual
16 issue which we have not had an opportunity to address. And
17 thus far, South African Airways has resisted all discovery.

18 If Your Honor has any questions in particular about
19 what we've submitted, I would be happy to answer them. It's
20 late. I'm not going to repeat what is in our brief. We
21 believe that there's waiver here; that South African Airways
22 is not a foreign state entitled to sovereign immunity; that
23 the commercial activity exception to sovereign immunity
24 applies; and that the motion should be denied.

25 THE COURT: And as far as subjecting a foreign

1 sovereign to discovery on the issue of whether they are a
2 foreign sovereign, is there authority for that?

3 MR. SPECKS: Absolutely. Until the, what the
4 decisions generally say, Your Honor, is that until the
5 jurisdictional issue has been determined, any discovery that
6 takes place as to someone claiming sovereign immunity should
7 be limited to the jurisdictional issue.

8 THE COURT: To that. Okay.

9 MR. SPECKS: Thank you, Your Honor.

10 THE COURT: All right.

11 MR. ATADIKA: Your Honor, I just, if you give me a
12 little chance, Your Honor?

13 MR. BLANCH: Your Honor?

14 THE COURT: You're looking for a response, too? A
15 very brief one.

16 MR. BLANCH: Very briefly.

17 THE COURT: Very briefly. I'll take the responses,
18 rebuttals, in the order in which people argued.

19 So, Mr. Blanch? Mr. Pri ver, you were second.

20 MR. PRIVER: I was second.

21 THE COURT: Yes, go ahead.

22 ARGUMENT VI -B

23 BY MR. PRIVER:

24 MR. PRIVER: The fact that Thai Airways engages in
25 commercial activity in the United States and executed a waiver

1 does not establish the applicability of the commercial
2 activity exception.

3 The case law is clear and the recent decision by the
4 Second Circuit in Kensington International which is reported
5 at 505 F.3d 147, specifically at page 155, discusses the case
6 law that's been extent in the Circuit, including Re: Society
7 International, that you have to look at the gravamen of the
8 complaint when trying to determine whether the action is based
9 upon the commercial activity.

10 If the complaint is not based upon the commercial
11 activity, then the commercial activity exception does not
12 apply. And you look at the gravamen of the complaint, which
13 is, in this case, the alleged conspiracy.

14 THE COURT: Well, it's price fixing.

15 MR. PRIVER: It's for price fixing.

16 THE COURT: It's the application or the charging of
17 a fixed price as to air transportation.

18 MR. PRIVER: But the price is the effect. The fact
19 that there's a price charged in the United States for air
20 cargo transportation is not alone sufficient to get over the
21 commercial activity exception.

22 There has to be a connection based upon causal
23 connection between the alleged gravamen and the harm,
24 essentially. And so, that's what we're saying is deficient in
25 this case. And it's not just a pleading issue. If you,

1 again, Philatech and a legion of other cases, talks
2 extensively about the evidence that's submitted in support of
3 the motion.

4 THE COURT: Wait. I really need to understand what
5 you're saying because I'm not. It's escaping me.

6 A fixed, an artificially fixed price by definition
7 causes harm; does it not?

8 An artificially fixed price, because of a conspiracy
9 to fix the price, that's a given. It's a harm.

10 MR. PRIVER: And I would agree with that.

11 THE COURT: Okay. So, what distinction are you
12 trying to draw?

13 MR. PRIVER: They have to make a showing. Their
14 say-so in their complaint based on a conclusion that there was
15 this agreement between 39 carriers to set prices globally does
16 not have a tendency in law or fact to prove, number one, that
17 Thai Airways was a part of that conspiracy.

18 THE COURT: But you're saying they need to have more
19 specific, a more specific showing of your client's actual
20 participation in a price fixing conspiracy --

21 MR. PRIVER: Correct.

22 THE COURT: -- that resulted in an artificial price
23 being charged --

24 MR. PRIVER: In the U.S.

25 THE COURT: -- on a contract of carriage touching

1 the United States.

2 MR. PRIVER: Yes.

3 THE COURT: Okay.

4 MR. PRIVER: And just on the pleading issue, again,
5 and this is in the brief Jin versus --

6 THE COURT: Counsel you need to go a little slower
7 for our court reporter's sake. It's been a long day for her,
8 too.

9 MR. PRIVER: Jin versus Ministry of State State
10 Security 475 F. Sub. 2d, at page 60, the Court again makes
11 clear that "because subject matter jurisdiction focuses on the
12 court's power to hear the case, the Court must give the
13 plaintiffs factual allegations closer scrutiny when involving
14 a 12(b)(1) motion than would be required for a 12(b)(6) motion
15 for failure to state a claim".

16 So, the idea that conclusory allegations of this
17 complaint satisfy that, I think, is sheer fantasy.

18 And on the discovery issue, and this is cited in a
19 footnote, the Stutts against De Deitrich Group, 465 Fed. Sup.
20 2d. 156/169, Eastern District of New York. "District courts
21 in this circuit routinely reject requests for jurisdictional
22 discovery where a plaintiff's allegations are insufficient to
23 make out a prima facie case of jurisdiction".

24 The whole point of this, Your Honor, is to keep the
25 foreign sovereign from having to assume and engage in the

1 burdens of litigation if the plaintiffs in the first instance
2 can't make a necessary showing in their pleading.

3 Not only have the plaintiffs failed do that in their
4 pleading, which is why they never asked for and probably never
5 got any jurisdictional discovery, but here we are on this
6 motion asking the Court to let us out of this case because we
7 don't really belong here. They've had their opportunity to
8 present the evidence and all they've shown this court is
9 matters that --

10 THE COURT: They make the argument that 12(b)(1)
11 motions, in 12(b)(1) motions the Court can look outside the
12 pleadings, in essence, and look to an appendix and look to
13 their brief.

14 And is it your argument that the Court can't do that
15 in an FSIA?

16 MR. PRIVER: No, absolutely not. The court can.

17 But I don't recall and again, I don't have a
18 photographic recollection of the record, but the only thing
19 that I recall the plaintiffs have ever set forth is that we do
20 business in the United States.

21 THE COURT: Okay. I understand. But the appendix,
22 the Court is permitted to look to the appendix.

23 MR. PRIVER: Absolutely. And they have an
24 obligation to produce evidence that shows that we were part of
25 a conspiracy and that that resulted in super-competitive

1 prices for the cargo shipments that were shipped from the
2 United States in Bangkok.

3 THE COURT: Okay.

4 MR. PRIVER: Okay?

5 Thank you, Your Honor.

6 THE COURT: Mr. Atadika, you wanted to say a few
7 words?

8 MR. ATADIKA: Yes, Your Honor.

9 THE COURT: Mr. Blanch does, too.

10 But folks, just a couple minutes. I think I
11 understood the arguments.

12 Mr. Blanch, you were first. So, go ahead.

13 ARGUMENT VI -B

14 BY MR. BLANCH:

15 MR. BLANCH: Less than one minute, Your Honor.

16 There are two things counsel said on rebuttal which
17 I view as incorrect.

18 The claimant is shocked that we're coming here
19 asking to assert FSIA in light of the waiver. Waivers are
20 narrowly construed. A narrow construction of a waiver does
21 not mean you waive everything under the sun.

22 THE COURT: Okay.

23 MR. BLANCH: The second point is that the waiver,
24 even if the Court were to find that the waiver were effective
25 and applied to this case, to essentially co-extend it with the

1 commercial activity exception, that's got to be based upon
2 commercial activity giving rise to the claim, that means that
3 it would effectively have the same effect as the commercial
4 activity exception.

5 If the Court were to find there were a commercial
6 activity exception in any case, that does not operate to
7 subject a foreign sovereign to a jury trial.

8 THE COURT: Understood. And they concede that. I
9 think, they concede that.

10 MR. BLANCH: I believe plaintiffs' counsel is saying
11 that in light of the waiver, they can be hauled into a jury
12 trial.

13 THE COURT: No, they don't concede. That's not the
14 argument. I didn't understand that to be the argument.

15 MR. SPECKS: I did not say that.

16 THE COURT: I think the FSIA, and you know I don't
17 have the statute clearly in mind, I think the FSIA designates
18 what the circumstances are in which the Court can acquire
19 jurisdiction to decide subject matter jurisdiction, and it
20 also says that in such cases the foreign sovereign retains the
21 right not to have a jury determine the case.

22 I think that's what the FSIA says.

23 MR. BLANCH: So, either way it's conceded that no
24 foreign sovereign in any event would ever be subjected to a
25 jury trial.

1 THE COURT: As long as their foreign sovereigns. I
2 think that's right.

3 Okay. Mr. Atadi ka?

4 ARGUMENT VI -B

5 BY MR. ATADI KA:

6 MR. ATADI KA: Your Honor, Michael Atadi ka for
7 Ethiopian Airlines. Again Your Honor, just two points.

8 Point number one, the fact that you have the
9 appendix to look at and the complaint cannot cure what is
10 fatal in this case. To take an FSI A defendant to court you
11 need to go through the language of the Act and you've got to
12 really pin the facts of the case on the defendant.

13 Just telling you, Your Honor, that you can look at
14 the appendix and then putting one or two paragraphs cannot --
15 it's a very serious law emphasized, only exclusively reserved
16 for sovereigns, and for very good reason. So, I am submitting
17 most respectfully that the plaintiffs have not shown anything
18 for you to change that policy.

19 THE COURT: Understand that the fact that I, that I
20 have to look at the appendix does not mean that I'm suggesting
21 that the appendix is sufficient.

22 I'm permitted to look at the appendix, but I think
23 all parties agree I'm permitted to look at the appendix do see
24 if they supply enough of the evidentiary basis for want of a
25 better word to provide subject matter jurisdiction. And

1 that's the only issue.

2 I'm not suggesting that -- I don't believe I ever
3 actually looked at the appendix and I'll confess that to
4 everybody. So, but now I will.

5 MR. ATADIKA: And Your Honor, I'm submitting that
6 even if you look at it, it cannot cure the defects of the
7 pleadings on the -- as far as the FSIA defendants.

8 THE COURT: Okay. So, you're saying everything has
9 to rise and fall on the pleadings; I am not permitted to look
10 at the appendix.

11 MR. ATADIKA: No, no, Your honor. I did not say
12 that.

13 THE COURT: Okay. What are you saying?

14 MR. ATADIKA: FSIA is a unique jurisdiction. It's a
15 unique regime. And for you to take a foreign sovereign to
16 court, you've got to plead it. And they have not shown
17 anything in any of these complaints that enough of an -- that
18 Ethiopian Airlines is an FSIA defendant. It's not there.

19 THE COURT: Okay.

20 MR. ATADIKA: Your Honor, the other point I would
21 like to highlight is the question of the waiver.

22 Now, we have submitted that a waiver, the waiver
23 clause comes from the permission that is given to an airline.
24 And that language, Your Honor, is in the Warsaw Convention.
25 So, we are submitting that if, in fact, the waiver language

1 which comes from that document, then Warsaw Convention should
2 apply to this matter.

3 Now, the Warsaw Convention also has exclusive
4 jurisdiction in the sense that you can only apply for remedies
5 that are specifically allowed by the Warsaw Convention. So,
6 if they are now relying on the language of the relation, which
7 is in fact in international air transportation, we submit most
8 respectfully, Your Honor, that the Warsaw Convention will
9 apply. If it is so, they have not pled that in any of the
10 pleadings to support that allegation that we have waived. And
11 then they go into the -- I don't know whether, Your Honor, you
12 got my submission on that.

13 They have resorted to the waiver language in a
14 document which is furnished to the airlines allowing them to
15 be, to do business in the United States. However, that
16 document is part of the Warsaw Convention language. So, if
17 they are now trying to rely on that waiver, most respectfully
18 then, they are subjecting themselves to the regime of the
19 Warsaw Convention. And the remedies there do not allow for
20 anti trust claims.

21 So, that's our position.

22 THE COURT: Okay.

23 MR. ATADIKA: That they cannot.

24 THE COURT: I understand.

25 Mr. Cross?

1 MR. CROSS: Yes. I will take less than one minute.

2 ARGUMENT VI -B

3 BY MR. CROSS:

4 I encourage you to look at the appendix. All of the
5 appendix; ours, theirs, everyone's.

6 THE COURT: Okay. I will be doing that.

7 MR. CROSS: Secondly, Mr. Specks did say one thing
8 that I think I need to correct.

9 He said the only thing we had done to act as an
10 organ of the state of the Republic of South Africa was to
11 report to the Department of Public enterprise.

12

13 (Continued on following page.)

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1 ARGUMENT VI -A

2 BY MR. CROSS

3 MR. CROSS: (Continuing) That is why I encourage you
4 to read the other affidavit, too, which is attached to the
5 motion papers. It makes it sound like we're reporting like
6 school children reporting to the principal, the Department of
7 Public Enterprise, which runs the airline.

8 THE COURT: I'm sorry.

9 MR. CROSS: The Department of Public Enterprise
10 after June 2006 was running an airline and reported to by
11 somebody that was functionally operating this airline.

12 THE COURT: You assumed operational control but had
13 not yet owned it?

14 MR. CROSS: The shares were delisted by the prior
15 owner and were being listed by the government and the
16 government changed the purposes of the airline to promote
17 tourism, to promote the transportation hub and --

18 THE COURT: I think I remember that.

19 MR. CROSS: That's the point.

20 THE COURT: Mr. Specks, very quickly.

21 ARGUMENT VI -A

22 BY MR. SPECKS

23 MR. SPECKS: This operational control nonsense that
24 he is giving you it's not in the affidavit that was submitted.

25 THE COURT: Fine, I'm going to look at the papers.

1 I assure you.

2 MR. SPECKS: With respect to this Warsaw Convention
3 nonsense, if you look and read the waiver.

4 THE COURT: If you would be useful without
5 characterizing just make the argument. Maybe you think it's
6 nonsense but I'm going to have to take -- I'm going to
7 consider it.

8 MR. SPECKS: It says the waiver is with respect to
9 those actions instituted and against it in another or tribunal
10 in the United States are, A, based on its operations in
11 international air transportation. That, according to the
12 contract of carriage include a point in the U.S. as a point of
13 origin/point of destination; or agreed stopping place; or for
14 which the contract of carriage with persons in the United
15 States then it says "Or," O-R;

16 B based on a claim under any international
17 agreement or treaties, that's the Warsaw Convention. So the
18 word "or" is disjunctive.

19 THE COURT: Understood. I understand the argument.

20 Let's go to the final issue and that's the Air
21 Mauritius. Actually, we have a statute of limitations issue.
22 I don't really need argument on it, I understand the issue and
23 I don't need argument. But Air Mauritius has a substantial
24 personal jurisdiction motion and so who is here for Air
25 Mauritius.

1 ARGUMENT VI -A

2 BY MR. DONOVAN

3 MR. DONOVAN: Richard Donovan, Kelly, Drye & Warren.

4 I conferred with counsel at the break and given
5 the late hour we've agreed to cut back to the bare minimum, it
6 will just take a minute or two to make our points and to
7 emphasize what are some of the things that have been raised
8 and answer questions that Your Honor might have.

9 THE COURT: Let me ask a question right off the bat.
10 Do I have to have an evidentiary hearing on the various
11 aspects of -- put aside for the moment this service that the
12 notion that I examine service under New Jersey law. I am
13 forgoing that frankly I'm not persuaded that I should look at
14 New Jersey law at this point.

15 I mean, if you'd served -- if the plaintiffs
16 had served their action in New Jersey with a New Jersey
17 district court, then and then transferred it here or had it
18 transferred here then clearly that would be the right
19 procedure but I'm not persuaded that I look to New Jersey law
20 to that -- well, in any event -- neither side shouldn't burden
21 themselves with argument on that.

22 But, I think I am examining this under New York
23 law. There is plenty of basis, it seems to me, or at least
24 there's plenty of room for argument about whether there are
25 sufficient indicia of doing business of transacting business

1 here out of which these claims arise such that I may have to
2 have evidentiary hearing so tell me about that.

3 MR. DONOVAN: Your Honor, there are a lot of
4 arguments, but I don't think you need an evidentiary hearing
5 because I don't think any of the facts would meet the
6 plaintiff's burden here.

7 The plaintiff's agree at Page 13 of their memo
8 that the standard at this point is that they must come forward
9 with because we have challenged jurisdiction and there has
10 been jurisdictional discovery. They can't rest on the
11 allegations of their complaint and they have done that in the
12 form of a submission of a number of documents which were
13 produced in discovery or they obtained from the Web.

14 And, what we're saying is that they've gone
15 ahead and submitted those facts but they do not prove what
16 they need to prove to meet either the minimum contacts the
17 various jurisdictional bases or at least, more importantly,
18 due process and to show that it would be reasonable for this
19 court to exercise jurisdiction over our client.

20 Our clients business is centered in Europe,
21 Asia, and Africa and perhaps it may be subject to jurisdiction
22 in one of those countries or continents and that's also where
23 the alleged conspiracy apparently took place. Plaintiffs
24 concede in their proof that it didn't happen here; it was
25 outside the United States.

1 THE COURT: But don't you charge prices here for
2 transportation of goods out of the United States and to the
3 United States, too, for that matter; but you impose charges
4 here, you solicit business here in New York through the agent
5 who has the authority to bind your airline, and I understand
6 that your airline itself, I guess, doesn't fly here but you
7 have arrangements with other airlines to where they'll pick up
8 the goods here and then transfer it to you. But you're the
9 one that arranges for that all carriage through your agent. I
10 mean, why is it that doing business here?

11 MR. DONOVAN: It's not, Your Honor.

12 First of all, in terms of the agent you can put
13 that aside because the Second Circuit said in the Wiwa case,
14 quoting the New York Court of Appeals, that you don't look at
15 the agent's actions to satisfy, or I should say, impute the
16 actions to the foreign defendant unless it was an exclusive
17 arrangement which it was not. This agent represents the eight
18 other airlines and so in an is not sufficient.

19 Secondly, the decision about what prices to
20 charge is made in Mauritius as set forth in the declarations
21 that we have submitted to the Court and there is nothing that
22 contradicts that.

23 So, when you're talking this morning about,
24 well, okay, the decision to apply quote, unquote, "The fixed
25 price," whether it was surcharges or what have you a decision

1 is made in Mauritius and they set what the rates are. And
2 then the only thing the New York agent does is it takes an
3 order, somebody comes up and says, "I want to send something
4 to Mauritius." They take that order, they can't even
5 themselves confirm that, they can't enter into the contract.
6 They have to then go back and check with headquarters in
7 Mauritius to find out if space is available on a particular
8 flight and to confirm what the fee would be and those are key
9 distinctions for a jurisdictional argument, Your Honor.

10 THE COURT: Okay. There was a variety of other
11 things. You do solicit business and the argument is you have
12 to have solicitation plus something.

13 MR. DONOVAN: There are a couple of things with
14 that. We really don't solicit business very much. We have a
15 website, that's about it, and there is no other showing of
16 solicitation.

17 But, secondly, as in, in fact, there was a
18 recent opinion by Judge Glasser who pointed out in a case
19 called Sikorsky Aircraft which came out at the time that we
20 were filing our reply memo where he pointed out under the
21 cases in the Second Circuit, in order to have solicitation you
22 have to have five percent or more of the company's revenues to
23 constitute substantial solicitation; and we've shown in the
24 facts we submitted to Your Honor our revenues from sales that
25 connect in any way to New York are way less than that and

1 that's --

2 THE COURT: But they're still in the hundreds of
3 thousands of dollars?

4 MR. DONOVAN: Yes.

5 THE COURT: Where does Judge Glasser get the five
6 percent from?

7 MR. DONOVAN: He cites a number of different cases
8 from different district court decisions and looks at what the
9 percentage was in each case.

10 THE COURT: Okay. So, it's -- okay. A survey of
11 the cases, basically.

12 MR. DONOVAN: Essentially, yes, Your Honor. And,
13 that ties into the reasonableness point: Why it would not be
14 reasonable to exercise jurisdiction in this case even if Your
15 Honor found that one of the jurisdictional bases was met which
16 we do not believe they were.

17 But just quickly, just a few of the salient
18 facts here. We were in the process of closing our New Jersey
19 office when we were served with the complaint and I think you
20 are allowed to take that into account in terms of the
21 reasonableness issue and the burden on a foreign defendant if
22 it's forced to come into this court and defend itself.

23 Secondly, there's no specific proof against our
24 client which Your Honor has already observed here.

25 Paragraph 30 of the complaint is the only one and the

1 allegations are similar to the one that you just read
2 regarding one of the other foreign defendants. They're just
3 very generic.

4 Another thing I want to point out to Your Honor
5 is that we are not involved at all in the European
6 investigation. Our client, to our knowledge, has not been
7 named in that and we are not involved here so that is not
8 dispute.

9 THE COURT: You are not naming that statement of
10 objections?

11 MR. DONOVAN: Correct, Your Honor, I have not seen
12 the statement but that is what I am told.

13 THE COURT: Who has seen it? Only plaintiffs I
14 guess.

15 MR. ARENSEN: The plaintiffs haven't seen it.

16 MR. TOMPKINS: The parties that are named there.

17 THE COURT: You wanted to see it.

18 MR. ARENSEN: Yes, Your Honor.

19 MR. TOMPKINS: Yes.

20 THE COURT: In a big way.

21 MR. TOMPKINS: I am --

22 MR. ARENSEN: They let us see it.

23 MR. WARNOT: They are obligated by European
24 Commission Law to look.

25 THE COURT: Sorry for interrupting.

1 MR. DONOVAN: You mentioned the connection with
2 other airlines. Your Honor understood that we do not, in
3 fact, land any planes in the U.S., our planes never come here.
4 We do have an interline agreement with other carriers so that
5 shipments can be made to or from but we criticized, Your
6 Honor, dozens of cases that say that's not enough to find
7 jurisdiction. Otherwise, every carrier or railroad would be
8 subject to jurisdiction anywhere that somebody connected to
9 their railroad or bought a connecting ticket.

10 THE COURT: But no single thing is enough, I don't
11 mean to suggest that. But you don't take these things in
12 isolation. You look at all the factors.

13 MR. DONOVAN: Agreed, Your Honor, and what we're
14 saying is we still have to have a jurisdictional basis and
15 overall, if you're looking at the reasonableness, you have to
16 look at everything. And, in particular, I would say under the
17 cases that we've cited, the miniscule percent of our sales
18 that have to do with the United States is a very key factor.
19 It's one of the cases noted. We would spend much more money
20 defending this complex litigation than we ever have received
21 in revenues from U.S. based commerce. And as you could tell
22 this is going to be a very expensive case to litigate
23 especially if Your Honor does not grant the motion to dismiss.

24 The other thing is just the obvious one that
25 Mauritius is a small country on the other side of the world.

1 I dare say that most of us didn't even know where it was
2 until --

3 THE COURT: I'm still not entirely sure. It's
4 somewhere in the Indian Ocean.

5 MR. DONOVAN: Yes, Your Honor, in the Indian Ocean
6 off the southwest coast of Africa.

7 THE COURT: Off of Madagascar.

8 MR. DONOVAN: It takes 30 hours to get there. You
9 have to change planes two or three times, and yes, these are
10 the days of modern air travel. But it's not just like hopping
11 a flight to London, this is really is on the other side of the
12 world and it's not easy to come back and forth.

13 In terms of reasonableness, the other factors
14 are where is the evidence located. Well, obviously, the
15 evidence with respect to us is located there which is not easy
16 to get to and from the sound of it, most of the evidence in
17 this case is going to be outside the United States, or
18 certainly much of it.

19 The other thing, Your Honor, that relates also
20 to reasonableness is that plaintiffs can obtain full relief in
21 this case from the other defendants. They don't need us here,
22 we don't add very much and that's a factor that the courts
23 have also considered.

24 THE COURT: Explain why that is.

25 MR. DONOVAN: Well, Your Honor, there are many or

1 defendant with larger pockets than us if it's a conspiracy
2 case.

3 THE COURT: Okay oh, I see joint and several
4 liability.

5 MR. DONOVAN: Yes, Your Honor.

6 THE COURT: I got it.

7 MR. DONOVAN: Putting aside the fact that as I've
8 said there is nothing whatsoever, not a single fact to connect
9 us to this alleged conspiracy. I will stop there unless you
10 have questions.

11 THE COURT: I think you've covered it. You did say
12 that the Internet website is not an interactive website. You
13 can't place orders on it? It's merely a -- it's a presence of
14 some kind here, right? Or it's a presence wherever it can be
15 viewed.

16 MR. DONOVAN: Yes, Your Honor.

17 Under the cases that deal with websites as a
18 basis for jurisdiction, this is more in the nature of what we
19 would a passive website where you can get information and you
20 can submit a request that says you're interested in shipping
21 something and get more information that way but you cannot
22 place an order.

23 THE COURT: You get information about rates.

24 MR. DONOVAN: What happens is if you submit
25 something and say, "I'm interested," you would then be

1 contacted by the local agent who would try to answer your
2 questions, give you rates and availabilities, and what have
3 you.

4 THE COURT: Okay.

5 MR. DONOVAN: Thank you, Your Honor.

6 MR. ASCIOLLA: Greg Ascio lla for the plaintiffs.

7 Good evening, Your Honor. I'm going to be very
8 brief. I guess I will start there must be I guess it's late
9 that I just want to quickly address New Jersey.

10 I'm disappointed that you don't think that's
11 sufficiently a strong argument, but I would urge you to look
12 at Judge Scheindlin's opinion in In Re: Ski Train Fire where
13 she did an extensive analysis on why it's proper when a
14 defendant is named as a transferee in an MDL proceeding to
15 look at the transferor.

16 THE COURT: There was no transferor; it was never
17 transferred. It is the potential transferor because you could
18 have sued them, but you didn't so this was never transferred.

19 MR. ASCIOLLA: We couldn't sue them there.

20 THE COURT: Why couldn't you? We're still getting
21 claim -- cases filed here that are then added. There is
22 nothing that prohibits somebody from filing a case somewhere
23 else.

24 MR. ASCIOLLA: Actually, Your Honor, if you look at
25 her case and the cases that she cites the proper place to name

1 new defendants in MDL proceedings is the transferee court.

2 THE COURT: Where is that stated?

3 MR. ASCIOLLA: In Re: Ski Train Fire.

4 THE COURT: Where in the case? Where is the rule
5 that says that? That's Judge Scheindlin's statement, I don't
6 even know I will look at the case but I'm not persuaded
7 frankly by just a judicial pronouncement that the Court
8 ignores the rules of civil procedure or even the MDL that case
9 this court has the jurisdiction over the transferor court
10 that's it but there is no transferor court.

11 So, why do I look -- does that mean that once
12 the case is consolidated in court that the Court can use any
13 state court jurisdiction anywhere to establish jurisdiction
14 here.

15 MR. ASCIOLLA: It would mean that you would look to
16 every jurisdiction where a transferor court is to find
17 jurisdiction.

18 THE COURT: You mean a transferor court could be?

19 MR. ASCIOLLA: No, let's take this case for instance
20 it would be the nine transferor courts that made up the
21 80 cases that are before you.

22 THE COURT: Okay.

23 MR. ASCIOLLA: So you could look back at any one of
24 those nine.

25 THE COURT: Any one of those nine and the District

1 of New Jersey was one of them.

2 MR. ASCIOLLA: And we have chose New Jersey because
3 Air Mauriti us concedes there was personal juri sdic ti on they
4 don' t concede due process satisfied they conceded that and we
5 picked New York for its obvious contacts with respect to, in
6 particular, the acts of its agent there not because the MDL
7 moved the cases here but that there' s juri sdic ti on over Air
8 Mauriti us here.

9 THE COURT: Okay.

10 MR. ASCIOLLA: If you think of it another way, if we
11 are -- well, if it's proper to be serving, I'm sorry, naming a
12 defendant here in this case, I don't think it would be fair to
13 plaintiffs to have to be stuck only naming defendants that
14 happen to do business in New York. Suppose --

15 THE COURT: No, of course, not but you could file
16 acquire juri sdic ti on where you can acquire juri sdic ti on and
17 then have the case transferred just like it happens all the
18 time in MDL cases.

19 Cases are filed around the country and even
20 after the case has been consolidated somewhere new cases get
21 filed and they get transferred in and that's the proper
22 procedure it seems to me. I don't see why that shoul dn' t have
23 been followed here.

24 I mean, you know, well any way --

25 MR. ASCIOLLA: Okay. Looking at Section 301 for

1 here in New York, I think it's a classic case of looking at
2 the agent's contacts here and finding that Air Mauritius is
3 doing business in New York and if you look at what this agent
4 was doing here on behalf of Air Mauritius in New York to have
5 an agency agreement where they were expressly authorized to
6 make cargo sales over the services of Air Mauritius and they
7 had a number of other services that they were providing on
8 behalf of Air Mauritius here soliciting, promoting, and
9 selling air cargo transportation employing staff --

10 THE COURT: But they say they weren't soliciting and
11 that's why I was getting to the point of whether I need to
12 have an evidentiary hearing on this.

13 I mean, if the agent was solicited, and then
14 there's a question about whether they're exclusive or not or
15 how exclusive they were. There is no question that Avia was
16 representing other airlines and you're saying that exclusivity
17 is not dispositive.

18 MR. ASCIOLLA: It is not dispositive, it is a
19 factor.

20 THE COURT: It would be helpful.

21 MR. ASCIOLLA: One of many factors.

22 THE COURT: Are there disputed factual issues about
23 how Avia is -- is it Avia or Avia how you this conducted their
24 business that I need to hold an evidentiary hearing.

25 MR. ASCIOLLA: I don't think there is any question

1 or dispute as to what Avia is doing.

2 THE COURT: Okay.

3 MR. ASCIOLLA: I think if you just look at all the
4 things in their agency agreement I don't think there is any
5 dispute that they are sell the services of Air Mauritius and
6 deriving standing revenues for Air Mauritius here in New York.

7 And I think if you look across the spectrum of
8 cases for §301 underpinning them all is that the agent is here
9 doing the business that Air Mauritius or the principal would
10 otherwise be doing if it weren't for the agent being here.

11 And here Air Mauritius was here, well, it was in New Jersey.
12 It was here doing the business of Air Mauritius of selling air
13 cargo services and when it left and Avia took that role. It's
14 doing the exact same -- I'm sorry -- it's providing the same
15 exact same service that is Air Mauritius did. Basically, Avia
16 stepped in Air Mauritius's shoes.

17 As far as the revenues, they're substantial.
18 They average almost a million dollars a year and if you look
19 up the Nippon case that was about \$600,000, that was an
20 Eastern District of New York case that satisfactory the
21 solicitation plus. I think another important factors.

22 THE COURT: What is it it's the volume of sales.

23 MR. ASCIOLLA: Right. Right.

24 THE COURT: Putting aside the percentage of their
25 overall revenue.

1 MR. ASCIOLLA: Courts to look at both they look
2 percentage with much more skepticism because you are making so
3 much money that percent an could be very, very tiny and yet a
4 large number in the United States. I think another important
5 factor with respect to Air Mauritius's relationship with the
6 agent is that they have I just want to get the wording right,
7 a very large degree of control over them and, again, it shows
8 that this really is in essence Air Mauritius here.

9 I think if you look at the contacts of Avia,
10 you can easily say that this is a classic case where an agent,
11 where you couldn't look at an agent's contacts and find
12 jurisdiction over the principal and I would urge the court to
13 look at the McLaughlin case which is strikingly similar to
14 this case. In that case the agency agreement looked almost
15 identical.

16 THE COURT: Is that a New York.

17 MR. ASCIOLLA: Eastern District of New York case
18 1985 found at 602 F. Supp. 29 and the Court found that,
19 "Without question a foreign company was undisputed doing its
20 business in New York with its agent under §301."

21 If I can touch upon the reasonableness factor
22 with respect to the due process argument.

23 THE COURT: Yes.

24 MR. ASCIOLLA: I think it would be a minimal burden
25 for Air Mauritius to be part of this litigation because

1 witnesses are here no New York, witnesses possibly are here in
2 New Jersey, and when litigation started Air Mauritius put into
3 storage all of their documents from their business for the
4 many years they were in New Jersey into storage in New Jersey.
5 So, there's going to be a very minimal burden as far as some
6 of the witnesses potential witnesses and certainly some of the
7 occupants.

8 Also, I understand it's a tiny island but Air
9 Mauritius is an international sophisticated airline. If
10 anybody has a lesser burden to travel it would be people
11 involved with involved with airline it might be funny, but we
12 have, we submitted documents itineraries of when various
13 business people from Mauritius from Air Mauritius traveled to
14 the United States when they were looking for a potential agent
15 to replace Air Mauritius and sell their cargo services here in
16 the United States.

17 So, I think it's very, very strong argument
18 under §301 and Air Mauritius's contacts through its agent.

19 THE COURT: Okay. All right. Thank you very much.
20 I think -- are there any loose ends I still need to hear from
21 people on?

22 MR. DONOVAN: Can I have 30 seconds? I'm sorry, I
23 know.

24 THE COURT: Okay.

25

1 ARGUMENT VI -A

2 BY MR. DONOVAN

3 MR. DONOVAN: I just need to correct the record on a
4 couple of things.

5 First of all, in terms of the evidence it's not
6 true that all our documents are in New Jersey. The documents
7 that are in New Jersey really are just those that relate to
8 the operations in the New Jersey office but the vast majority
9 of our documents are in Mauritius.

10 Likewise, the witnesses that will know anything
11 about our involvement with other defendants and participation
12 in any conspiracy are in Mauritius, they're not in New Jersey.
13 There is nobody left in New Jersey at this point.

14 And, on the control point, I would just refer
15 Your Honor to the Miller case from the New York Court of
16 Appeals I think this case is much more like that one than the
17 cases that counsel cited.

18 There was not a large degree of control by us
19 over the business of Avia cargo we only had control over their
20 dealings represent us which is a crucial distinction in terms
21 of jurisdiction. It's not like the case where went the way
22 after parent sub but there is an issue about the did the
23 parent control the sub in the construction that is not what
24 happened here again as I think I said.

25 THE COURT: The distinction you're making is that

1 while you had control over what they did on behalf of you, you
2 didn't have control over what they did the rest of the time.

3 MR. DONOVAN: Correct, we didn't run their airways.

4 THE COURT: You didn't run their operation?

5 MR. DONOVAN: Right.

6 THE COURT: In fact, part of your argument is that
7 you had such substantial control that they were very limited
8 in what they could do.

9 MR. DONOVAN: Correct.

10 THE COURT: Everything had to be cleared through you
11 and Air Mauritius.

12 MR. DONOVAN: My last point is they could not bind
13 us we made our own decisions in Mauritius about whether to
14 accept particular proposals.

15 Thank you, Your Honor.

16 THE COURT: Thank you very much.

17 I do want to just make the point that the
18 advocacy has really been remarkable both on the papers and in
19 the arguments today I really appreciate it. It's been a
20 pleasure to hear so many good litigators advocate their
21 positions. So thank you.

22 MR. ARENSON: Thank you, Your Honor, thank you for
23 were you patience.

24 (WHEREUPON, the proceedings were adjourned.)

25 * * *

I N D E XW I T N E S SP A G E

ARGUMENT I

BY MR. SCHWARTZ

10

ARGUMENT I

BY MR. TOMPKINS

32

ARGUMENT I

BY MR. SCHWARTZ

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ARGUMENT I

BY MR. SCHWARTZ: (Conti nui ng.)

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ARGUMENT I

BY MR. TOMPKINS

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ARGUMENT II

BY MR. SHERMAN

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ARGUMENT II

BY MR. ARENSON

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ARGUMENT II

MR. SHERMAN

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ARGUMENT III

BY MR. LOVELL

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ARGUMENT III

BY MR. SHERMAN

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